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Office-Supreme Court, U.S.

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ALEXANDER L. STEVAS,

CLERK

SUPREME COURT OF THE UNITED

STATES

October Term, 1982

HUSTLER MAGAZINE, INC.,  
a corporation, and  
CHIC MAGAZINE, INC.,  
a corporation,

Petitioners,

vs.

EASTMAN KODAK COMPANY,  
a corporation,

Respondent.

WRIT OF CERTIORARI  
To The United States Court Of Appeals  
For The Ninth Circuit

APPENDIX A TO  
PETITION FOR WRIT OF CERTIORARI

RICHARD D. AGAY  
COOPER, EPSTEIN & HUREWITZ  
A Professional Corporation  
9465 Wilshire Blvd., Suite 800  
Beverly Hills, California 90212  
(213) 278-1111

Attorneys for Petitioners

## TABLE OF CONTENTS

	<u>Page</u>
1. ORDER	A-1
2. ORDER	A-2
3. JUDGMENT	A-3
4. ORDER GRANTING MOTION TO DISMISS AS TO COUNT ONE AND GRANTING PARTIAL SUMMARY JUDGMENT, SUMMARY JUDGMENT AS TO COUNTS TWO, THREE AND FOUR	A-6
5. REPORTER'S TRANSCRIPT OF PROCEEDINGS	A-10
6. CONSTITUTIONAL PROVISIONS AND STATUTES	
6.1. AMENDMENT I	A-54
6.2. AMENDMENT XIV	A-54
6.3. TITLE 18, §1461	A-55
6.4. TITLE 18, §1462	A-55
6.5. TITLE 18, §1465	A-56
6.6. TITLE 28, §2201	A-56
6.7. TITLE 42, §1983	A-57
6.8. CALIFORNIA PENAL CODE, §311.2	A-57
7. APPELLANTS' BRIEF	A-58
8. APPELLEE'S BRIEF	A-104

P-2

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

PHILLIP H. GARDNER  
CLEVELAND, OHIO

Nos. 80-5861/6077  
D.C. # CV 80-561-IH

Plaintiffs-Appellants,

## ORDER

y.

EASTMAN KODAK COMPANY, a corporation,

RECEIVED

SEP 20 1982

**Defendant-Appellee.**

COOPER, EPSTEIN & HUREWITZ  
A, P, C<sub>1</sub>

Appeal from the United States District Court  
for the Central District of California  
Irving Hill, District Judge, Presiding  
Argued and submitted September 10, 1982

Before: WRIGHT, TANG, and SCHROEDER, Circuit Judges.

We affirm the grant of summary judgment for the reasons announced by the district court.

A-1

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

NOV 15 1982

HUSTLER MAGAZINE, Inc., a corporation  
and CHIC MAGAZINE, Inc., a corporation,

) Nos. 80-5861/6077  
) D.C.# CV 80-561-IH  
) ORDER

Plaintiffs-Appellants,

v.

EASTMAN KODAK COMPANY, a corporation,

RECEIVED

NOV 17 1982

Defendant-Appellee.

COOPER, EPSTEIN & HURNWITZ  
A. P. C.

Before: WRIGHT, TANG, and SCHROEDER, Circuit Judges.

A majority of the panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

JOHN R. McDONOUGH

J. STEVEN GREENFELD

BALL, HUNT, HART, BROWN AND BAERWITZ

450 North Roxbury Drive, Suite 500

Beverly Hills, California 90210

(213) 278-1960

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Attorneys for Defendant

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SEP 28 1980

CLERK U.S. DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
DEPUTY

CLERK U.S. DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
DEPUTY

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CLERK U.S. DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
DEPUTY

HUSTLER MAGAZINE, INC., a  
corporation, and CHIC  
MAGAZINE, INC., a corporation,

Plaintiffs,

vs.

EASTMAN KODAK COMPANY, a  
corporation,

Defendant.

CIVIL ACTION NO. 80 00561 IH

JUDGMENT

There came before the Court for hearing on September 22, 1980, a motion by Defendant filed June 30, 1980, denominated as a motion for summary judgment. The Court announced that the motion would be considered in some respects as a motion to dismiss and in other respects as a summary judgment motion. Appearances were: for Defendant-moving party, Ball, Hunt, Hart, Brown and Baerwitz by John R. McDonough, Esq. and J. Steven Greenfeld, Esq. For Plaintiffs-respondents, Cooper, Epstein & Hurewitz by Richard Agay, Esq.

//

A-3

The Court having heard argument and having considered the evidence, Points and Authorities and other documents filed in support of said motion and in opposition thereto, on September 29, 1980 made its "Order Granting Motion to Dismiss as to Count One and Granting Partial Judgment, Summary Judgment, as to Counts Two, Three and Four." In said Order, the Court (1) granted Defendant's motion, as a motion to dismiss, with respect to Count 1 of the complaint and gave Plaintiffs until October 2, 1980 to file an amended complaint stating in separate counts the causes of action under §1 and §2 of the Sherman Act, with detailed allegations of harm and (2) granted Defendant's motion for summary judgment as to Counts 2, 3 and 4 of the complaint. Plaintiffs did not file an amended complaint by October 2, 1980 nor have they filed such a complaint to the date of this judgment.

In light of the foregoing, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

1. Count 1 of the complaint is hereby dismissed, with prejudice, and Plaintiffs Hustler Magazine, Inc. and Chic Magazine, Inc. shall take nothing thereby against Defendant Eastman Kodak Company.

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//

2. Plaintiffs Hustler Magazine, Inc. and Chic Magazine, Inc. shall take nothing and Defendant Eastman Kodak Company is hereby granted judgment against Plaintiffs in respect of Counts 2, 3 and 4 of the complaint.

3. Each side shall bear its own costs.

*W. J. Hill*

DATED: October 14, 1980

IRVING HILL

IRVING HILL, Judge  
United States District Court

FILED

SEP 29 1980

ENTERED

SEP 30 1980

CLERK, U. S. DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
BY DEPUTY

CLERK, U. S. DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
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OCT - 2 1980

COOPER, EPSTEIN & HUREWITZ  
A. P. C.

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

HUSTLER MAGAZINE, INC., )	NO. CV 80-561-IH
a corporation, et al, )	
Plaintiff, )	ORDER GRANTING MOTION TO DISMISS
)	AS TO COUNT ONE AND GRANTING
v. )	PARTIAL JUDGMENT, SUMMARY JUDGMENT,
)	AS TO COUNTS TWO, THREE AND
)	<u>FOUR</u>
EASTMAN KODAK COMPANY, )	
a corporation, )	
)	
Defendant. )	

There came before the Court for hearing on September 22, 1980, a motion by Defendant filed June 30, 1980, denominated as a motion for summary judgment. The Court announced that the motion would be considered in some respects as a motion to dismiss and in other respects as a summary judgment motion. Appearances were: for Defendant-moving party, Ball, Hunt, Hart, Brown and Baerwitz by John R. McDonough, Esq. For Plaintiffs-respondents, Cooper, Epstein & Hurewitz by Alan Isaacman, Esq.

The Court having heard argument and having considered the evidence, Points and Authorities and other documents

1. A-6

1 filed in support of said motion and in opposition thereto,  
2 ORDERS, ADJUDGES AND DECREES AS FOLLOWS:

3 1. As to Count 1, which incorporates causes  
4 of action under Sections 1 and 2 of the Sherman Act, the  
5 motion is granted as a motion to dismiss. Plaintiffs are  
6 given until October 2, 1980, to file an amended complaint  
7 stating in separate counts the causes of action under Section  
8 1 and Section 2 of the Sherman Act with detailed allegations  
9 of harm.

10 2. As to the second and third causes of action,  
11 Defendant's motion is granted. The Court finds that there  
12 is no bona fide dispute of material fact and that Defendant  
13 is entitled to judgment as a matter of law. As to the  
14 second and third causes of action, Plaintiffs Hustler Magazine,  
15 Inc. and Chic Magazine, Inc. shall taking nothing by their  
16 action and Defendant Eastman Kodak Company shall have judgment  
17 against Plaintiffs.

18 3. As to Count four, Defendant's motion is granted.  
19 The Court find<sup>s</sup> that there is no bona fide dispute of material  
20 fact and that Defendant is entitled to judgment as a matter  
21 of law. As to the fourth cause of action, Plaintiffs Hustler  
22 Magazine, Inc. and Chic Magazine, Inc. shall taking nothing  
23 by their action and Defendant Eastman Kodak Company shall  
24 have judgment against Plaintiffs.

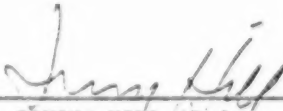
25 4. The Court's further findings of fact and  
26 conclusions of law and a statement of its reasons are contained  
27 in a transcript of the proceedings in open court on September  
28 22, 1980, which transcript is ORDERED filed upon its

1 preparation. In the event of any appeal as to any of the  
2 matters decided on September 22, 1980, the appellant shall  
3 furnish a copy of said transcript as a part of the record  
4 to the Court of Appeal.

5 5. As to any summary judgment granted herein,  
6 each side shall bear its own costs.

7 6. The Clerk shall transmit a copy of this Order  
8 by United States mail to counsel for both sides.

9 DATED: September 29, 1980.

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\_\_\_\_\_  
IRVING HILL, Judge  
United States District Court

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

Mustler Magazine  
VS  
Eastman Kodak Co.

PLAINTIFF(S)

CASE NUMBER

CV 80-561-IH

NOTICE OF ENTRY

DEFENDANT(S)

TO THE ABOVE NAMED PARTIES AND TO THEIR ATTORNEY(S) OF RECORD:

You are hereby notified that Order granting motion to dismiss  
to count one and granting partial judgment ,summary judgment,as to  
counts two,three and four

\_\_\_\_\_ in the above entitled case was entered in  
the docket on 9-30-80 .

You are also notified that if this case was tried and you introduced exhibits into evidence, they must be claimed at this office after the expiration of thirty days from the receipt of this notice. (After sixty days in cases in which the United States, its officers or agencies were parties) Unless they are claimed within thirty days after the expiration of the above period, they will be destroyed pursuant to Local Rule 20(a). If an appeal is taken they will, of course, be held until the Appellate Court finally determines the matter. Exhibits which are attached to a pleading will not be destroyed but will remain as a permanent record in the case file.

(over)

Civ 26 (10/78)

NOTICE OF ENTRY

A-9

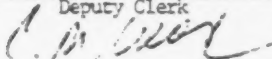
CERTIFICATE OF MAILING

I, Edward M. Kritzman, Clerk, United States District Court, Central District of California, and not a party to the within action, hereby certify that on 9-30-80, I served a true copy of this notice of entry on the parties in the within action by depositing true copies thereof, enclosed in sealed envelopes, in the United States Mail in the United States Post Office mail box at Los Angeles, California, addressed as follows:

Bali, Hunt Hart & Brown  
450 N. Roxbury Dr.  
Beverly Hills, Calif. 90210

Cooper, Epstein & Hurewitz  
9465 Wilshire Blvd.  
Beverly Hills, Calif. 90212

EDWARD M. KRITZMAN, CLERK

By Carren M. George  
Deputy Clerk  


NOTICE

IN ACTIONS ARISING UNDER THE ECONOMIC STABILIZATION ACT, THE EMERGENCY PETROLEUM ALLOCATION ACT, AND THE ENERGY POLICY AND CONSERVATION ACT, NOTICES OF APPEAL TAKEN FROM THIS JUDGMENT MUST BE FILED IN THE TEMPORARY EMERGENCY COURT OF APPEALS IN ACCORDANCE WITH THE RULES OF PROCEDURE OF THAT COURT.

1 UNITED STATES DISTRICT COURT  
2 CENTRAL DISTRICT OF CALIFORNIA  
3

4 HONORABLE IRVING HILL, CHIEF JUDGE PRESIDING  
5  
6

7 HUSTLER MAGAZINE, INC., et al., )  
8 Plaintiffs, )  
9 v. )  
10 EASTMAN KODAK COMPANY, )  
11 Defendant. )  
12

COPY

CV 80-561-IH

13  
14  
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16  
17 REPORTER'S TRANSCRIPT OF PROCEEDINGS

18 Los Angeles, California

19 Monday, September 22, 1980  
20  
21  
22

23 XAVIER MIRELES, CSR  
24 Federal Court Reporter  
25 419 U.S. Courthouse  
312 North Spring Street  
Los Angeles, California  
90012

2-100 A-10

Appearances:

For the Plaintiff Hustler:

COOPER, ESPTEIN & HUREWITZ  
BY: RICHARD D. AGAY  
VICTOR VITLIN  
9465 Wilshire Boulevard, 800  
Beverly Hills, California 90212

For the Defendant:

BALL, HUNT, HART, BROWN & BAERWITZ  
BY: JOHN R. McDONOUGH  
J. STEVEN GREENFELD  
450 North Roxbury Drive  
Beverly Hills, California 90210

1 LOS ANGELES, CALIFORNIA; MONDAY, SEPTEMBER 22, 1980; 3:00 P.M.

2 - - -

3 THE COURT: Good afternoon, gentlemen.

4 Call the case, Mr. Clerk, but let me get my calendar  
5 in shape here first.

6 Go ahead.

7 THE CLERK: Item 8, CV 80-0561-IH: Hustler Magazine,  
8 Inc., et al., v. Eastman Kodak Company.

9 Counsel, announce your appearances, for the plaintiff  
10 first.

11 MR. AGAY: Richard D. Agay and Victor Vitlin,  
12 of Cooper, Epstein & Hurewitz.

13 THE COURT: Which of you gentlemen will handle  
14 the argument?

15 MR. AGAY: I will, Mr. Agay, your Honor.

16 THE COURT: All right.

17 MR. McDONOUGH: John R. McDonough and Steven  
18 Greenfeld for the defendant Eastman Kodak Company.

19 THE COURT: Are you going to handle it, Mr. McDonough?

20 - MR. McDONOUGH: Yes, I will, your Honor.

21 THE COURT: Okay. In this case, plaintiffs are  
22 publishers of two national magazines, Hustler and Chic.  
23 They sue defendant Eastman Kodak under the antitrust laws  
24 and various Civil Rights and constitutional provisions of law.

25 They allege Eastman refuses to process and deliver

A-12

1 color film which the magazines have given to Eastman for pro-  
2 cessing and delivery.

3           Somewhere in the papers, a little is made that the  
4 film is owned by the magazines who give the film to photo-  
5 graphers; and I don't know whether these photographers  
6 are employees or independent contractors. The photographers  
7 take the pictures, and the photographers go to Eastman for  
8 development of the film and apparently printing the film,  
9 and give Eastman Kodak the film under their own names,  
10 meaning the photographer's name; is that right, Mr. Agay?

11           MR. AGAY: Yes, your Honor.

12           Although there are also instances where the film  
13 is given to Kodak under the company name. I don't think  
14 any of these particular films were given under the company  
15 name.

16           THE COURT: And those photographers are, in your  
17 view, what? employees? or independent contractors?

18           MR. AGAY: They would be independent contractors,  
19 but the film as we alleged remains ours at all times.

20           THE COURT: Okay. The motion before me filed June  
21 30 is denominated as a Motion for Summary Judgment.

22           In some aspects where facts are not involved, it  
23 could have been brought and denominated as well as a motion  
24 to dismiss. It might be that in my discussion of the  
25 various aspects of the motion, some aspects will be treated

A-13

1 as a motion to dismiss; and I will try to delineate such  
2 aspects as I get to them; but there is no doubt that in many  
3 aspects, this is a true summary judgment motion; so I want to  
4 follow my normal practice of listing the evidence to make sure  
5 I have not overlooked any.

6 The evidence for the defendant moving party is as  
7 follows: We have an affidavit from Mr. McClasky; a declaration  
8 of Mr. Fisher in Eastman Kodak Customer Service; an affi-  
9 davit of Mr. Allenger; an affidavit of Mr. Shock; a declaration  
10 of Mr. Stephenson.

11 Defendants have filed copies of plaintiffs'  
12 magazines, at least one copy of each.

13 We have a group of affidavits from some of the  
14 defendants' laboratory managers saying that they can't find  
15 any film belonging to Hustler or Chic that has been retained  
16 by Eastman.

17 On this small subject, there may well be a conflict  
18 of material fact because the magazines -- the plaintiff says  
19 that film belonging to the magazines has been retained by  
20 Eastman, and Eastman responds by saying that they cannot  
21 find the film under the photographers' names.

22 So I think we have a conflict of fact, but that  
23 conflict is irrelevant to the issues that are raised by this  
24 motion.

25 I am going to assume for the purpose of all issues

1 that are discussed and decided today that defendant Eastman,  
2 as alleged, has retained and refused to deliver the processed  
3 version of the films that plaintiff has left them, with  
4 Eastman, for developing, and has refused to return even the  
5 negatives.

6 Now, let me check with you, Mr. McDonough, have  
7 you listed all the evidence?

8 MR. McDONOUGH: Yes, I have, your Honor.

9 And we accept that assumption that the film belongs  
10 to them.

11 THE COURT: Very good.

12 Now, for the plaintiffs respondents, I have the  
13 following evidence: A declaration of the Vice-President,  
14 Mr. Faer, F-a-e-r; and an affidavit of Mr. DiMarco, one of  
15 the photographers.

16 MR. AGAY: Excuse me, your Honor. He was not one  
17 of the photographers. He was Production Chief, I believe  
18 it was.

19 THE COURT: He is not a photographer?

20 MR. AGAY: No. He is a former employee.

21 THE COURT: Former what? production chief?

22 MR. AGAY: May I look at his affidavit?

23 THE COURT: Sure. I don't mind.

24 I thought I had it right.

25 MR. AGAY: I'm sorry.

A-15

1 THE COURT: He says, "I worked as an Assistant  
2 Photographer."

3 MR. AGAY: That was during this period; then it  
4 says, "Thereafter, I went to work for Hustler Magazine,"  
5 and I don't know exactly what his title was.

6 I think there is an affidavit by the plaintiffs  
7 which attributes a title to him.

8 THE COURT: Well, if you look at the first paragraph,  
9 you will see what threw me off.

10 MR. AGAY: Yes. It is ill-organized.

11 THE COURT: He doesn't tell who he worked as an  
12 Assistant Photographer for.

13 MR. AGAY: Right.

14 THE COURT: Do you think he did not work for  
15 Hustler as an Assistant Photographer?

16 MR. AGAY: I know he didn't. I am just trying to  
17 figure out exactly what his title was, but I know that it  
18 wasn't an Assistant Photographer.

19 THE COURT: All right. Let's not characterize it  
20 by title.

21 Continuing: After DiMarco, we have a declaration  
22 of Mr. Elia, who was the Photo Director.

23 We have a declaration of Mr. Clatt, C-l-a-t-t,  
24 another photographer; declaration of Mr. Baes, another  
25 photographer.

A-16

1 Is that all the evidence, Mr. Agay?

2 MR. AGAY: Yes, your Honor.

3 THE COURT: All right. Now, before I get to this,  
4 I note that there is now going on in state court an action  
5 between the same parties; and I gather that means it is  
6 brought by both magazines, Hustler and Chic, to get their  
7 negatives and/or developed pictures back.

8 The action is in the nature of conversion and  
9 replevin.

10 I know the number of the case. You furnished that  
11 to me. It is LASC case No. C 313377. I do not know the  
12 title of that case. I assume that it was filed before the  
13 federal court case was filed.

14 Can you straighten me out on those matters?

15 MR. AGAY: As to the title, it would be identical  
16 except there would be some DOES added to the defendant list.

17 THE COURT: So it's Hustler Magazine and Chic  
18 Magazine v. Eastman?

19 MR. AGAY: Right.

20 And as to the date of the filing, I don't have that  
21 with me, but I would suspect that it was filed about the  
22 very same day.

23 THE COURT: Very well. All right.

24 I note that action because it seems to me that  
25 it will necessarily involve many of the contract issues

1 involved in this federal case and may set up a collateral  
2 estoppel or res judicata bar.

3 All of this is principally stated. I now want  
4 to return to what I believe are the problems that are posed  
5 by this motion.

6 I think the motion poses problems that break down  
7 into four subdivisions; and the first is the Sherman Act,  
8 Section 1. That is included in the First Cause of Action,  
9 although the First Cause of Action is broader than the Sherman  
10 one alone.

11 The second problem is the Sherman Act, Section 2,  
12 which is always part of the First Cause of Action.

13 The third problem is the question of the State  
14 action as involved in Causes of Action 2 and 3; and the  
15 fourth problem is the declaratory judgment prayer set up as  
16 a separate Cause of Action in Cause of Action No. 4.

17 Those are the subdivisions as they appear to me.  
18 I will discuss them separately, hear argument on each after  
19 I have indicated my tentative decision.

20 Let's go right to Sherman, Section 1.

21 Section 1 of the Sherman Act makes unlawful any  
22 contract, combination, or conspiracy in restraint of trade.

23 So far as I can see, this case involves no combina-  
24 tion and no conspiracy. None can be alleged, and none has  
25 been alleged; so we are left with the question of contract.

1 In a minute, I am going to ask you, Mr. Agay,  
2 to outline the nature of the alleged contract; but before I  
3 do, I want to say one thing on a different subject.

4 The defendant has contended that there can be no  
5 Section 1 liability unless there is what defendant calls a  
6 multiplicity of actors on the defense side of the case.

7 I think the defendant relies here on some language  
8 in the Supreme Court that was, when it was uttered, less than  
9 careful on the part of the court, and that the court is  
10 against this contention.

11 I believe a single actor can violate Section 1.  
12 There has to be a contract between actor and the plaintiff or  
13 someone else of which the plaintiff can take advantage, but  
14 there is no requirement under Section 1, as I understand the  
15 law, for a multiplicity of actors.

16 Mr. Agay, come up now, if you don't mind, and  
17 describe to me the essentials of the contract that you think  
18 exists between plaintiffs and Eastman that give you an access  
19 to Section 1 of Sherman.

20 MR. AGAY: I don't believe there is a contract  
21 between the plaintiffs and Eastman Kodak that gives rise to  
22 a Section 1 claim. The contracts to which we refer are contracts  
23 that Eastman Kodak makes with others.

24 We are not sure of exactly who all of those others are.

25 THE COURT: What others?

1 MR. AGAY: Developers. Other developers, competitors.

2 THE COURT: You mean other people who give them  
3 film to develop?

4 MR. AGAY: No. No. No. Other laboratories who  
5 are working under license agreements granted by Kodak.

6 THE COURT: Oh, you lost me. I don't see any sign  
7 of that in the Complaint. Is that in there?

8 MR. AGAY: I was trying to find the exact portion,  
9 your Honor. I am not certain that it is well pleaded.

10 THE COURT: I may have missed this. This comes  
11 to me, not only as a startling thing, but also almost shocking.

12 Let me turn to the Complaint, and let's see if  
13 there is even an intimation of that in here.

14 Hold on. Hold on.

15 All right. The Complaint was filed February 13.  
16 I have it.

17 First Cause of Action is Sherman I. Where is that?

18 MR. AGAY: I may have been overly restrictive.  
19 There is a contract conceivably -- never mind. I am sorry,  
20 your Honor.

21 I don't think -- I confess, I don't believe the  
22 Complaint is well pleaded for that particular element.  
23 I think that --

24 THE COURT: If I gave you the opportunity to replead  
25 it --

A-20

1 MR. AGAY: Your Honor, if I could just --

2 THE COURT: Hold on one second.

3 Describe the contract you would rely upon, and how  
4 it violates Section 1 of Sherman, and the way it gives you  
5 rights.

6 MR. AGAY: The contract or contracts between defendant  
7 and competing laboratories by virtue of which they obtain  
8 chemicals and/or licensing of equipment upon which Kodak has  
9 a patent restricts our ability -- that is, plaintiffs' ability  
10 -- to obtain quality pictures.

11 THE COURT: Well, I know that under Section 2 of  
12 Sherman you contend that Eastman has uniquely the best service  
13 so that you are deprived of that service. You ought to make  
14 that a separate market. We will get to that.

15 Let me have this other again, the contract.

16 MR. AGAY: We have not, of course, conducted any  
17 discovery, but we believe that each one of these competitors  
18 operates to the extent --

19 THE COURT: Now, "competitors" are people who also  
20 develop color film for the public; is that right?

21 MR. AGAY: Right.

22 THE COURT: Go ahead.

23 MR. AGAY: They operate to the extent they develop  
24 Kodachrome color film through the patents and licenses of  
25 the patent -- granted the licenses that is granted by Kodak.

1 THE COURT: Just Kodachrome? not Ektachrome?

2 MR. AGAY: It doesn't make any difference what  
3 but Kodachrome is the only film that we are involved with  
4 that case.

5 Those contracts we believe are contracts that w  
6 violative of Section 1. It is to those contracts that w  
7 refer.

8 I should say: Those are the contracts that we  
9 would refer.

10 THE COURT: These are contracts with other phot  
11 finishing laboratories that somehow that restricts them in  
12 some fashion?

13 MR. AGAY: Yes, your Honor.

14 THE COURT: To what effect does that restrict t  
15 What happens? How do you get to the Complaint about that?

16 MR. AGAY: The effect is that we are unable to  
17 pictures developed by others of equal or acceptable quality.

18 THE COURT: That is the same monopolization cha  
19 that you made under Section 2, isn't it?

20 MR. AGAY: Right. The damage is the same. The  
21 charge is different.

22 THE COURT: We are going to take a brief recess

23 (Brief recess.)

24 THE COURT: Mr. McDonough, would you come to the  
25 podium.

1 MR. McDONOUGH: Yes, sir, your Honor.

2 THE COURT: Were you as surprised as I at the  
3 dimensions of the Sherman 1 claim, or did you understand  
4 that was the Sherman 1 claim?

5 MR. McDONOUGH: No. I have to confess that I was  
6 equally surprised, your Honor; and it seems to me that counsel  
7 has really acknowledged that we both should have been surprised.  
8 He has said that it was not well pleaded. As I understand  
9 him, he said that, given the opportunity, he would allege  
10 the existence of some agreements which he says may exist  
11 between Kodak and some other laboratories. He doesn't  
12 apparently have a shred of evidence in his hands or in his  
13 possession that any such agreements do exist. He hasn't,  
14 apparently, made any investigation or asked anybody whether  
15 they do exist; and what I think he is asking this court to  
16 let him do is this: To allege that they do exist and engage  
17 in a large program of discovery to see if he can turn up  
18 out of our files or somebody else's some such agreement, and  
19 I don't believe that it was anywhere signaled in his Complaint  
20 as originally filed so that it is --

21 THE COURT: That is a problem that neither side  
22 addresses in its briefing.

23 The Ninth Circuit, my bosses, are reasonably liberal  
24 in stating that even though certain theories of action are  
25 not even hinted at in the Complaint, before you grant judgment,

1 you have to give some opportunity for amendment.

2 Now, whether that would apply to a case like this,  
3 I don't know. We have here a mixup in one Cause of Action,  
4 Section 1 of Sherman and Section 2 of Sherman, and the only  
5 language about denying competing laboratories access to  
6 anything is in the paragraph that deals with Section 2 of  
7 the Sherman Act with the monopolization paragraphs.

8 Now, counsel has conceded -- first, the court  
9 has ruled there is no combination and what?

10 MR. McDONOUGH: Conspiracy, your Honor.

11 THE COURT: Conspiracy.

12 Counsel has conceded that there is no contract upon  
13 which he relies on between the defendant and plaintiffs.

14 MR. AGAY: There is no contract, but there is an  
15 agreement which I believe amounts to the same thing.

16 THE COURT: An "attempted contract" is a word --  
17 that is a group of words I never heard about.

18 MR. AGAY: It is something which the defendants  
19 claim to be a contract; to wit, the, quote, Exhibit A; their  
20 exhibit in which they set forth the conditions under which  
21 they will accept film.

22 THE COURT: You have to be specific, and you just  
23 can't keep backing and filling in a situation like this.

24 Do you allege a contract between either/or both  
25 plaintiffs and Eastman, or not?

1 MR. AGAY: No. We believe that that contract was  
2 never entered into, but they have told us that they would  
3 not deal except under those terms.

4 I think that that amounts to the same thing for the  
5 purposes of Section 1.

6 THE COURT: Let me find out if there is any contract.  
7 Have you got any case that says that a contract,  
8 which is a word of art -- you all know what it means.  
9 You learned it in the first semester of law school, whether  
10 it be an offer and acceptance, or an unilateral contract;  
11 without a contract, what makes you think you have a Section 1  
12 claim?

13 MR. AGAY: I don't have it at my fingertips, but I  
14 believe what the case says is that you don't need a plurality  
15 of actors. It involved cases where an attempt was made to  
16 impose certain conditions upon the plaintiff, who rejected  
17 those conditions; and the claim was that this was the contract.

18 THE COURT: Let's hear what those are. Cite them.  
19 Discuss them with me.

20 MR. AGAY: I believe Parke Davis was one of those  
21 which was cited in our brief, I believe. If you would give  
22 me a second to find the pages.

23 THE COURT: Is Parke Davis a Section 1 case?

24 MR. AGAY: I believe so, your Honor.

25 THE COURT: But does it go off on this question?

A-25

1 MR. McDONOUGH: In those cases, your Honor,  
2 there was an allegation that Parke Davis contracted with  
3 some of its customers to restrict competition in the business.

4 THE COURT: Those others could complain of that?

5 MR. McDONOUGH: Yes, that one was damaged by the  
6 contractual arrangements between Parke Davis.

7 Those, as I recall it, were re same-price-maintenance  
8 agreements or agreements to divide up territory, or whatever;  
9 but there were existing contracts between Parke Davis and the  
10 other principal plaintiffs in those cases -- or principal  
11 defendants -- and some people to make certain arrangements  
12 to restrict competition in a market; and the person or the  
13 plaintiff was complaining of the fact that those contracts  
14 had been made.

15 THE COURT: Let's assume -- and I want to tell  
16 you both -- that based on the allegations of the complaint,  
17 I am prepared to grant the motion finding no dispute of  
18 material fact -- that is, as to Section 1, Sherman -- no  
19 dispute of material fact and entitled to judgment as a matter  
20 of law.

21 Now, I know of no authority that says that a  
22 summary judgment motion cannot be addressed to the Complaint  
23 as pleaded; and when the other side does not seek a continuance  
24 for further discovery nor did it seek an opportunity to amend  
25 the Complaint until the hearing of the Motion for Summary

1 Judgment, that the court cannot go forward and grant summary  
2 judgment; and that is what I propose to do. I think we will  
3 go forward.

4 I want the record to be quite clear that there  
5 was no request for a continuance of this summary judgment  
6 motion herein for the purpose of discovery or any other  
7 purpose on the part of the plaintiffs.

8 Now, excuse me a second. Let me get my papers  
9 in order, and we will go forward.

10 MR. AGAY: Your Honor, may I --

11 THE COURT: Hold on, please. I have to get my  
12 papers in order.

13 I have a trial going, and I have a benchful of  
14 papers from that and another benchful of papers from other  
15 matters today; so you will have to stay with me.

16 Here are the papers in the 20th Century matter,  
17 Mr. Clerk. Let's get them cleared out of here.

18 The clerk is going to check in chambers. I think  
19 I left my notes there.

20 One drowns in a sea of papers.

21 Among the reasons that I would grant the summary  
22 judgment and find the defendant entitled thereto as a matter  
23 of law as to Sherman I is that as pleaded, the arrangement  
24 complained of in terms of the photofinishers market is not  
25 anticompetitive. It is, in fact, procompetitive because,

1 as pleaded, we find the defendant staying out of this part  
2 of the business and thus benefiting every one of its potential  
3 competitors who is willing to develop this type of picture.  
4 It is procompetitive.

5           Moreover and as a separate reason, we have here  
6 in my view a proper application of rule of law enunciated  
7 some 60 years ago by the Supreme Court in U.S. v. Colgate.  
8 That rule of law, to be sure, has been limited in its factual  
9 application in the intervening 60 years, but the Supreme Court  
10 continues to cite it with approval where the facts are  
11 appropriate; and the rule of law is this: That a business  
12 person, a trader, or manufacturer in private business is  
13 free to exercise an independent discretion as to the parties  
14 with whom he will deal, announcing in advance the circumstances  
15 under which he will refuse to sell. That is a paraphrase of  
16 the language from U.S. v. Colgate and has been cited many  
17 times with approval since that case was decided.

18           It appears to me also that if by any chance under  
19 Sherman 1 there is any restraint of trade involved, it  
20 certainly looks to me like a reasonable one.

21           Now, I want to press on to Sherman, Section 2.  
22 Sherman 2 outlaws monopolies in interstate commerce,  
23 conspiracies to monopolize, and attempts to monopolize.

24           As plaintiff agrees, there can be no conspiracy  
25 in this case in view of the single defendant.

1 Plaintiff does allege an attempt to monopolize and an actual  
2 monopoly.

3 Plaintiff says that Kodak's photofinishing service  
4 in the development and printing of still photography on colored  
5 film is so much superior to all others that it should be  
6 deemed to constitute a market in and of itself. On that,  
7 I think there is probably a dispute of material fact in the  
8 evidence. Whether this is a market and a market in and of  
9 itself involves factual matters; and there is a dispute in  
10 the declarations that I have.

11 If there is a separate market on the part of Kodak,  
12 it is a monopoly thereof of Kodak. That monopoly may turn  
13 out to be either illegal or benign, and that gets us back  
14 to the question of the predatory aspects, if any, in the  
15 history of that monopoly by which it was created or is  
16 attempted to be created.

17 I have to tell you that although under the briefs  
18 both sides seem to assume that one developer out of hundreds  
19 or thousands of photo labs, one developer may constitute a  
20 market in and of itself if its product is greatly superior;  
21 so I have accepted that assumption, but I sure want you to  
22 try to marshal some further authority on it if the issue  
23 comes up again.

24 I know a little bit about photography as an amateur  
25 photographer and about developing, and I know and it would

1 not be difficult to take judicial notice of the fact that  
2 hundreds of custom finishing labs exist in the various  
3 cities of this country who are prepared to and do solicit the  
4 developing and printing of colored film; and those labs and  
5 many of them, (A), charge more money than Kodak, a lot more;  
6 and, (B), they sell their services as being vastly superior  
7 to Kodak's; and I am therefore a little bit skeptical about  
8 this legal claim that this is a separate market so superior  
9 that it must be regarded as a market in and of itself. Those  
10 are factual matters.

11 Our Circuit in the Industrial Building case notes  
12 the claim made by one of the parties that one person's  
13 product -- in our case, it's one person's services -- can be  
14 so distinctively better as to constitute a market all by  
15 itself; and that the Circuit, in noting that claim, expressed a  
16 lot of doubt about it, but they did say that there should be an  
17 opportunity to show it factually; and I think for that reason  
18 that I would decline any summary judgment at this point on  
19 Sherman 2.

20 The case I have in mind -- I don't know if you  
21 cited it -- is Industrial Building Materials v. Interchemical  
22 Corp., 437 F.2d 1336.

23 It's black-letter law, gentlemen, that even if  
24 there is a monopoly or an attempt to monopolize in a market,  
25 it is not redressable under Section 2 unless the monopoly

1 was achieved by predatory methods or the attempt is being  
2 made by predatory methods and with a predatory intent.

3 MR. McDONOUGH: Your Honor, before you pass beyond  
4 Section 2, may I be heard briefly?

5 THE COURT: I haven't passed yet. I am still  
6 ruminating about Section 2. If you will be seated, I will  
7 finish ruminating, and then we will let you speak, and we  
8 will hear from you.

9 I will talk a little bit about this: Defendants  
10 make an argument that if they have a monopoly under Section 2,  
11 plaintiffs are not hurt by that monopoly; and, thus, the  
12 complaint on the Cause of Action for Section 2 ought to be  
13 dismissed.

14 Maybe, Mr. Agay, you will come to the podium and  
15 tell me what injuries you say that you have suffered from  
16 the alleged monopoly or attempt to monopolize, and where  
17 that injury is alleged in the Complaint.

18 MR. AGAY: May I have one moment, your Honor?

19 THE COURT: Sure.

20 MR. AGAY: The question, I believe, is whether or  
21 not we are within the target area of the acts that we  
22 complain of. We are the direct customer of -- the potential  
23 direct customer of Kodak. I don't know how much more direct  
24 we could be than that. We are the ones that are injured by  
25 the fact that they have the monopoly. We are the ones who

1 are unable --

2 THE COURT: Well, let me put this to you: What is  
3 the injury? Is it the fact that you can't get your pictures  
4 quite as nice as you think Kodak and Kodak alone can develop  
5 them?

6 MR. AGAY: Well, that is the primary injury. The  
7 ancillary injury is that we are restricted in our ability to  
8 compete with other magazines.

9 THE COURT: Well, first of all, Kodak's policy --  
10 and there is no conflict in the evidence on this -- is applied  
11 across the board to everybody who wants them to finish this  
12 kind of picture, isn't it?

13 MR. AGAY: Well, there is that allegation, your  
14 Honor. We have information that that isn't true, but we  
15 haven't had a chance at discovery to prove that.

16 THE COURT: Well, again, I have to take the evidence  
17 as I find it; and here it is: That this is Kodak's policy  
18 across the board fairly and evenly applied to everybody,  
19 magazines or nonmagazines.

20 MR. McDONOUGH: Right.

21 THE COURT: They have announced publicly that they  
22 will not develop this kind of picture; so don't give them  
23 the rolls to develop. That is what they say.

24 Now, how can you be injured competitively if  
25 every other magazine is in the same boat?

1 MR. AGAY: Every other magazine doesn't use this  
2 subject matter.

3 THE COURT: Every other magazine built around the  
4 pictures of nude ladies. I think that should be stated as  
5 a basis in posing this whole case. Your two magazines are  
6 built around and centralized around pictures of nude ladies,  
7 isn't that true?

8 MR. AGAY: I don't know if it's centralized. It is  
9 certainly --

10 THE COURT: We have the two exemplars. They speak  
11 for themselves.

12 MR. AGAY: Yes.

13 THE COURT: Now, if you accept that every other  
14 magazine similarly stressing those pictures must meet the  
15 same policy problems that you do, thus you are not competitively  
16 disadvantaged; isn't that correct?

17 MR. AGAY: With all due deference, your Honor,  
18 I don't say that we compete with Cosmopolitan and every other  
19 magazine. Perhaps the magazines we would compete more with  
20 are magazines with pictures that are slanted on this --

21 THE COURT: Is there any affidavit that you have  
22 furnished me that says that you compete with Cosmopolitan or  
23 anybody else?

24 MR. AGAY: We compete with all magazines. I am  
25 not certain -- there is no affidavit that says that we don't,

1 which is the problem here at hand.

2 THE COURT: Except I have the exemplars of the  
3 magazines, and it would appear to me strange -- if I can  
4 take judicial notice of Cosmopolitan, and I have seen it  
5 many times -- that to be told that you are competing with  
6 that magazine. You are saying that is factual now, and it is  
7 raised by the evidence; is that it?

8 MR. AGAY: I couldn't point to the evidence.  
9 All I can say is that there is no request for judicial  
10 notice nor could there be judicial notice that the only  
11 magazines we do compete with are others equally affected by  
12 this formulation of policy.

13 THE COURT: Can you tell me anything else about  
14 the injury from this monopoly or attempted monopoly? What  
15 other injuries are there?

16 MR. AGAY: I would say that our competition, our  
17 ability to compete with other magazines, is the damage that  
18 we suffer in connection with the Section 2 claim.

19 May I point out one other thing? In answer to  
20 several comments the court has made and in particular this  
21 one, we do point out at the threshold of our brief that  
22 there has been no discovery; and many of these matters are  
23 peculiarly within the knowledge solely of Kodak.

24 THE COURT: What do you think the court is supposed  
25 to do?

1 Let's now discuss the summary judgment practice.

2 Are you saying that a court, met with a summary judgment motion  
3 and not confronted with any request to continue for the  
4 purposes of discovery or anything like that, can say, "Oh, sure.  
5 They are entitled to a summary judgment on the evidence I have,  
6 but maybe the plaintiff will get some other evidence somewhere,  
7 sometime; so I'd better not give the summary judgment."

8 Is that the way you see summary judgment practice  
9 in the federal court?

10 MR. AGAY: I believe that is what the authorities  
11 cite. A chance should be given for discovery, especially in  
12 antitrust cases.

13 THE COURT: Isn't there an obligation to seek a  
14 continuance for that purpose?

15 MR. AGAY: Not in the case that we have cited and  
16 reviewed, your Honor, starting at page 7 --

17 THE COURT: Hold on. Let's take a look at them.

18 Gentlemen, we are getting so late in the day that  
19 we will probably have to continue this to another day.

20 I want to look at your response and look at the  
21 cases you are talking about. Hold on.

22 I find your declarations, but I can't find your  
23 opposition memo. What page?

24 MR. AGAY: Starting at page 7, your Honor.

25 THE COURT: Let's hear one of those cases.

A - 35

1 What are the facts in that case? What was the motion? to  
2 dismiss? or for summary judgment?

3 MR. AGAY: I believe in each of these, it was for  
4 summary judgment.

5 THE COURT: Was it a Rule 12 or a different kind of  
6 rule?

7 MR. AGAY: I believe each of these was a Rule 56  
8 or a motion for summary judgment. I confess not to have the  
9 facts in mind.

10 THE COURT: How about that, Mr. McDonough?  
11 Let's discuss such summary judgment practice.

12 MR. McDONOUGH: Yes, your Honor.

13 It seems to me that the practice is very clearly  
14 set forth in Rule 56(f), which provides that in the event that  
15 someone confronted with a motion for summary judgment feels  
16 that he needs more time to be able to respond, he is supposed  
17 to file an affidavit with the court in which he sets out  
18 under oath what it is that he thinks he can get, and why  
19 he thinks that would be material or make a motion under  
20 Rule 56(f) which would justify the court in continuing the  
21 motion, which is precisely what the rule says; and that is  
22 what the practice is, as I understand it, and what the  
23 practice should have been if the plaintiff wasn't prepared  
24 to respond to the motion and either fall or win on the basis  
25 of the record now before the court.

1 THE COURT: Well, Mr. Agay, that is what 56(f) says;  
2 and I do not find any affidavit from you that meets the  
3 requisites of Rule 56(f).

4 Did I miss it?

5 MR. AGAY: No. The only discussion we have of that,  
6 your Honor, is on these pages on the Memorandums of Points  
7 and Authorities.

8 The only discussion that we have for the need of  
9 delay is on page 7.

10 THE COURT: There is no motion, and there is no  
11 affidavit.

12 Let's take another brief recess. I want to take  
13 a quick look at some of the learning under 56(f).

14 (Brief recess.)

15 THE COURT: Are you telling me, sir, that the  
16 cases cited at the top of page 8 in your memo are like this?  
17 You have no affidavit and no request for continuance but a  
18 statement by the Appellate Court that you can't take the  
19 record as you find it. Even though they haven't asked for  
20 any continuance, you have to give them time? Is that what  
21 the law is?

22 MR. AGAY: I don't want to make that representation  
23 without rereading the case, your Honor.

24 THE COURT: All right.

25 Gentlemen, I will tell you later what I am going

1 to do with respect to the First Cause of Action, which has a  
2 jumble of claims under Sherman 1 and Sherman 2.

3 I now am going to proceed to the Second Cause of  
4 Action and to the Third Cause of Action, which will be discussed  
5 together.

6 Counts Two and Three are Federal Civil Rights claims  
7 under Section 1983 of Title 42. That is Count Two, the 1983  
8 claim; and Count Three is a Fifth Amendment claim. Both  
9 depend on state action or governmental action.

10 Defendants have before us evidence uncontradicted  
11 that indicates there is no state action. Their evidence is  
12 that they have had no threats of prosecution or contacts  
13 with the state of federal officials although they admit that  
14 the motivation for their policy for not developing this type  
15 of film rests in the state obscenity laws and their fear of  
16 prosecution thereunder.

17 Plaintiffs claim first that the requisite govern-  
18 mental action is furnished by state and federal trademark laws  
19 and federal patent laws. I do not find requisite government  
20 action from those laws.

21 I think plaintiffs are similarly wrong on the  
22 law, and they have cited no persuasive authority to support  
23 this claim.

24 It is my tentative view that a refusal to provide  
25 service and to deal based on fear of prosecution under state

1 law does not constitute state action sufficient to support  
2 the Second and Third Causes of Action, and I propose to grant  
3 the motion as to them.

4 There are several ways of rationalizing this result.  
5 In the first place, the case here is not a race discrimination  
6 case; and our own Circuit has recognized that state action  
7 requirements are different in race discrimination cases than  
8 they are in other cases. The decision I have in mind is  
9 Adams, decided in 1973, 492 F.2d 324.

10 The plaintiffs argue that it is improper to  
11 distinguish between race discrimination and First Amendment-  
12 type cases, which they say the instant case is.

13 There are cases, however, finding no state action  
14 even though the rights claimed are of the First Amendment  
15 type. One of those that was typical of that group is a  
16 case called Grafton v. Brooklyn Law School, 478 F.2d 1137  
17 decided by the Second Circuit in 1973.

18 Additionally, I think the law is tending to a  
19 recognition that borderline obscenity material that might  
20 well fall within obscenity laws is not entitled to the same  
21 panoply of protection as are other First Amendment-type  
22 materials.

23 Four members of the Supreme Court have already  
24 articulated this concept in Young v. American Mini Theatres;  
25 and I believe the law is tending in that direction. That

1 is just really another reason for saying that our case is  
2 different from the cases where Southern restaurant owners  
3 did not serve blacks and/or their white supporters for fear  
4 of prosecution under Southern municipal ordinances segregating  
5 the races.

6 Another factor should be mentioned. In all of  
7 those race cases, as the Supreme Court has said a couple of  
8 times, the statutes involved were clearly and beyond dispute  
9 invalid. Invalid, really, the Supreme Court said, on their  
10 face; and here the statute that is being discussed is quite  
11 different.

12 Kodak is concerned about state and federal statutes  
13 which carefully track the decisions of the Supreme Court,  
14 the recent decisions on obscenity. Those statutes are  
15 presumptively and probably valid. They have been adjudicated  
16 as being valid; so that is an additional reason for not  
17 applying the state action concept that has come down to us  
18 in those restaurant cases.

19 There is another factor that, at least, ought to  
20 be hinted at or put on the table. There may well be a  
21 privilege that constitutes a defense in both an antitrust  
22 economic context and a Civil Rights context where the action  
23 complained of is for the purpose of avoiding contravening,  
24 presumptively valid statutes of this kind. I don't articulate  
25 that as a privilege, but the law may also be developing in

1 that direction.

2 Now, I want to move on to Count Four; and when  
3 I am through, I will let counsel discuss Counts Two, Three,  
4 and Four together.

5 Count Four seeks declaratory relief in the form  
6 of a declaration that both state and federal obscenity laws  
7 are unconstitutional. Count Four seeks to have both state  
8 and federal obscenity laws declared unconstitutional as  
9 applied to Kodak or someone else in Kodak's position who is  
10 merely a developer and photofinisher of photographs.

11 It is clear that these laws, both sets, have been  
12 adjudicated as valid in criminal cases and other contexts.

13 My tentative view is to dismiss Count Four. I say,  
14 "dismiss." It could just as easily be a summary judgment,  
15 but I say "dismiss." It would be a holding, if I used  
16 summary judgment, that there is no bona fide dispute of  
17 material facts and that no entitlement has been shown as a  
18 matter of law.

19 The reason to grant the Motion to Dismiss is  
20 that there is no case or controversy; and there is no  
21 constitutional issue involving either federal or state  
22 obscenity laws -- particularly state -- when the case is  
23 pending in the federal court, nor should it be decided in a  
24 federal court without a case or controversy.

25 Kodak tells us it has no interest in upholding

1 either set of laws; and, as I have stated, neither set of  
2 laws has been asserted by the government involved against  
3 Kodak. There has been no threat of prosecution or other  
4 action yet posed. In essence, if the court went forward,  
5 we would have a collusive action or certainly one in which the  
6 interests of both the state and federal government are not  
7 represented in the sense of the laws challenged as unconsti-  
8 tutional.

9 Plaintiff says, however, that there is a way of  
10 having those governmental interests represented.

11 Plaintiff points to 28 U.S.C. Section 2403.

12 That section permits this court to notify state and federal  
13 officials of the pendency of this action and permits those  
14 government officials to intervene in this case, if they  
15 choose to do so.

16 There is, however, case law that the existence  
17 of 28 U.S.C Section 2403 does not make what is otherwise no  
18 case or controversy into an actual case or controversy.  
19 The courts read Section 2403 as merely permitting intervention  
20 where the state government and federal government and their  
21 officials are not directly named as defendants. The courts  
22 have persisted in the holding that there is no case or  
23 controversy despite the existence of that statute.

24 The cases that so hold are U.S. v. Johnson,  
25 319 U.S. 302, and Ruotolo v. Ruotolo, that's R-u-o-t-o-l-o,

1 572 F.2d 336, decided by the First Circuit in 1978. So my  
2 proposed action is to grant the motion and dismiss without  
3 any leave to amend Counts Two, Three, and Four. My proposed  
4 action as to Count One with respect to both the Sherman 1 and  
5 Sherman 2 claims is to grant a Motion to Dismiss with a right  
6 to plead over, which pleading, if it is made, will separately  
7 state Sherman 1 and Sherman 2 claims with some specificity;  
8 then the <sup>plaintiffs</sup> plaintiffs may do one of two things. They may move  
9 immediately to dismiss -- not for summary judgment, but to  
10 dismiss -- those claims, Section 1 and Section 2; or they  
11 may wait for discovery, a reasonable period being 60 days,  
12 to allow plaintiff to discover and may thereafter move for  
13 summary judgment.

14 Now, I will hear from plaintiffs first, bearing  
15 in mind two things: The lateness of the hour and the fact  
16 that I have obviously given considerable thought to this  
17 matter.

18 MR. AGAY: If the court please, Kodak has come up  
19 with a policy which does not track with either law, doesn't  
20 use the words "patently offensive," is totally dissimilar to  
21 the policy in the federal act and state act, and now refuses  
22 to return the pictures under its censorship.

23 THE COURT: Now, so far as returning, that is a  
24 matter pending in the state court, which is a far better  
25 tribunal for the adjudication of that matter.

1 MR. AGAY: As the affidavits point out, to get  
2 those pictures back two years later would be of little value,  
3 if any.

4 What is needed is a determination as to whether or  
5 not in this intermediate step which -- I ran across a case  
6 which I didn't know before, which California has already  
7 held that you can't stop somebody in an intermediate stage.  
8 I can give the citation later, if need be -- to say that in  
9 this intermediate stage the law is going to permit or to allow  
10 a private party to act as to have a prior restraint and that  
11 there is no remedy either by challenging the application of  
12 the act under the Fourth Cause of Action; and assuming that  
13 it is proper, then Kodak's action is improper under the  
14 Second or Third Cause of Action grants to everyone the right  
15 to claim that this act permits them to do anything -- to  
16 withhold property or to do anything under the fear of prose-  
17 cution; and if the government did that, there would be no  
18 doubt but that there were a prior restraint which would be  
19 struck down; and the cases we have cited show that if a  
20 private party does it, the same results obtain.

21 The court pointed out that there is maybe a distinc-  
22 tion in the quantum of proof necessary to find state action  
23 in discrimination cases as opposed to First Amendment cases.

24 I have some difficulty with those decisions which  
25 state that there is a different standard. Either the state

1 is involved, or it is not involved. What the court does not  
2 mention is that we have also cited the abortion case; and  
3 there has been no statement that I have heard from the court  
4 or that I have read that says also in the abortion cases  
5 we'll have to come up with a different standard than we will  
6 in the instance of freedom of speech; so the statement dicta  
7 or otherwise say that we have got different ground rules when  
8 we are determining whether there is a state action in the  
9 discrimination cases would not apply to the doctor prohibited  
10 from performing the abortion in the case that we have cited.

11 There they found state action because of the -- I  
12 guess it was federal funds to construct the hospital in that  
13 particular instance so that if there can be state action  
14 there, why not here where the party admits, "The only reason  
15 we are not doing this is because of a federal law and a state  
16 law; and, therefore, we can interfere where the government  
17 could not in the return of the property."

18 We believe and the court has stated that there has  
19 never been a threat against Kodak of prosecution, although  
20 they have been doing this for years. There has never been a  
21 threat against Kodak for any prosecution.

22 Why is it now that they should be able to withhold  
23 it under the color of these laws which the government cannot  
24 do because it would constitute a prior restraint if the  
25 government did it, clearly.

1           Why can they do indirectly, when the cases say  
2 they can't, why can they do indirectly -- the government --  
3 what they cannot do directly.

4           The brief points out, and it is clear that the  
5 effect of what is going on is Kodak is acting as a censor.  
6 It looks at every transparency and says, "This is good, this  
7 one's not. This one's good, this one's not," for a magazine  
8 publisher, not for the amateur user, who doesn't care whether  
9 he gets it back the next day or next week.

10           For the magazine publisher, this censorship totally  
11 or dramatically interferes with his ability to publish. In the  
12 noted cases, they tell us, "Don't interfere with the editorial  
13 rules. Don't get involved with the editorial rules."

14           THE COURT: Even though it is on notice and assumes  
15 the risks when it delivers that film for processing by Kodak?

16           MR. AGAY: Maybe if Kodak had said, "We make the  
17 determination ourselves that we don't want to be involved  
18 in this." Maybe it would be a different problem in that  
19 they are avoiding state action; but when Kodak says, "We do  
20 this under threat of law." And they claim that is the reason  
21 they are doing it because of this law, then so far as state  
22 action is concerned, there is state action.

23           Insofar as the other elements the court mentioned,  
24 if it is unconstitutional to do, then the contract of adhesion,  
25 if it is a contract, would not be valid anyway for the reasons

1 we pointed out in our brief, that this simple notice cannot  
2 constitute a waiver in and of itself especially of a constitu-  
3 tional right.

4 Now, at the time those transparencies are returned,  
5 nobody knows what will be the ultimate content of the magazines;  
6 and to allow the proscription of the return -- or to permit  
7 the proscription of the return of negatives and bar someone  
8 from getting those negatives or transparencies in a fashion  
9 that is usable, at least to the standards of this magazine and  
10 others, under the threat of federal law, so they claim, and  
11 under the threat of state law, so they claim -- I don't know  
12 how there could be clearer state action unless the state  
13 said, "And we mean that Kodak or developers shall not even  
14 permit the transmission of those transparencies."

15 We don't believe the laws were intended to apply  
16 to Kodak. We believe that the court has stated that the  
17 proof lies in the pudding that nobody ever made any noises  
18 against Kodak; and yet we are standing here on the horns of  
19 a dilemma. We can't attack the law directly. The federal  
20 law we certainly can't attack in the state court very  
21 efficaciously; and we can't attack their failure to return  
22 the pictures because the mere --

23 THE COURT: How long are you going to need to  
24 argue this matter?

25 MR. AGAY: I think I'll be through very briefly.

A-47

1 THE COURT: I don't mean to rush you. I just want  
2 to know because I have some engagement which I want to be sure  
3 I get to; and I want to give the other side a chance.

4 MR. AGAY: Rather than rushing, as the court  
5 indicated earlier, maybe we could continue it. I would prefer  
6 that because obviously the effect of the court's order would  
7 be --

8 THE COURT: How long will you need, Mr. McDonough?  
9 You heard the court's indicated decision.

10 MR. McDONOUGH: Yes, your Honor. I am satisfied  
11 with that indicated decision. I am not totally satisfied  
12 with it, but it seems to me it disposes the matters that  
13 were brought to the court today in our favor.

14 As I understand it, it gives him the opportunity  
15 to present --

16 THE COURT: I will give you five or six minutes  
17 more.

18 MR. AGAY: May I ask for a continuance? I think  
19 the court indicated earlier that --

20 THE COURT: That will be denied. I'd rather finish.  
21 I have an important case in trial, and I just can't  
22 interrupt it; and I don't know when it would ever end so  
23 that I can get back to this one.

24 MR. AGAY: May I review my notes?

25 THE COURT: Of course. Take your time.

A-48

1 MR. AGAY: The court pointed to the fact that it  
2 believes that there is a broadening of the law that if there  
3 is something akin to obscenity, then it doesn't receive the  
4 same protection as other materials.

5 I respectfully disagree especially if that deter-  
6 mination is made in advance of the publication without viewing  
7 the entire publication which, of course, would be impossible  
8 until the pictures are ultimately published.

9 THE COURT: The consequence of your argument is  
10 that even though there is criminal responsibility for aiding  
11 and abetting a criminal violator, that one must take the risk  
12 if he is asked to process part of a magazine or what may go  
13 into a magazine which may seem to that processor obscenity  
14 and put him in liability as an aider and abettor because he  
15 doesn't know what is going to be in the magazine as a whole?  
16 Is that your position? It is just too bad if the magazine  
17 as a whole turns out to be obscene? Then he can be held,  
18 but he can't do anything about it?

19 MR. AGAY: No, that is not my position. That is  
20 why I believe the Fourth Cause of Action is the appropriate  
21 cause of action and the appropriate way of dealing with this.

22 First of all, the answer to the court's question  
23 is that same question could have been posed with respect to  
24 the abortion matter. The hospital party was subject to  
25 criminal --

1 THE COURT: That is the Fourth Circuit. That is  
2 not our Circuit, and it stands alone. Everybody else,  
3 including the Ninth Circuit, indicates that there is a differ-  
4 ence between the rule of those restaurant cases as extended  
5 in via Fourth Circuit to the abortion cases and the rest.

6 MR. AGAY: Well, to the extent that there be a  
7 dilemma, if there really be a dilemma, and I question that  
8 for the same reasons as before that there never has been a  
9 prosecution, to the extent that there is a dilemma that the  
10 court foresees for these people and to the extent that there  
11 is a counterclaiming problem -- but here we have a private  
12 party setting itself up as the censor and the determiner of  
13 what it is that can be published and what it is that can't.  
14 If, as we have indicated, it is the only one who gives a good  
15 product, and if we pose a different example, what if it were  
16 a motion picture that we were involved in that they were  
17 developing, and what if they got the dailies and just saw  
18 some frames. They'd say, "Which pictures can be seen ulti-  
19 mately on the screen or which can't?"

20 What if they were getting excerpts from Ulysses  
21 in little bitty parts? Instead of photographing it, they  
22 were printing it, and they said, "This part is no good. You  
23 can't have it back. This part is good. You can have it  
24 back." We'd never have the opportunity of seeing the finished  
25 work if what the court is saying is correct, that we apply

A-50

1 the statutes to the developer and we apply these statutes to  
2 the person that made the paper.

3 If these statutes were applied to the one that made  
4 the paper, they would say, "Well, if I sell them to Hustler,  
5 maybe they are going to be used in a magazine. Maybe I can  
6 be prosecuted."

7 The answer is that the statute is not intended to  
8 be so broadly construed, and there is no forum to get that  
9 construction especially when our dispute is with Kodak in the  
10 first place and there has been no threat of prosecution by  
11 the U.S. Attorney so that I believe that this is the appro-  
12 priate place.

13 If Kodak doesn't have the concern although it  
14 fought pretty hard on the Fourth Cause of Action, if Kodak  
15 really doesn't have a concern, I believe that there is a dispute  
16 between us that should be declared that Kodak is not subject  
17 to these sanctions when it merely returns first edition film.

18 Maybe a different standard applies if we sent in  
19 pictures for redevelopment.

20 THE COURT: I'm sorry, sir, but your time has now  
21 expired.

22 The court's indicated decision will be the court's  
23 decision of findings and those that I have orally expressed.

24 I would like the defendants to order a transcript,  
25 please, of all proceedings this afternoon. That transcript,

1 as soon as it is prepared, will be filed and will constitute  
2 the court's findings and conclusions.

3 Let it be clear that to the extent that I have  
4 granted any summary judgment, I have found that both parties  
5 dispute the material facts and that the moving party is entitled  
6 thereto as a matter of law.

7 Now, as to the First Cause of Action, the new  
8 complaint setting forth in separate counts and with some  
9 specificity the Sherman 1 and the Sherman 2 claims must be  
10 filed 10 days from today; and then, the plaintiff thereafter  
11 will have 60 days for discovery before the defendant can file  
12 any summary judgment motion, but defendant is not barred  
13 from filing a motion to dismiss earlier than that.

14 All right, gentlemen. Court is adjourned.

15 MR. McDONOUGH: Thank you, your Honor.

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IN THE UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

HUSTLER MAGAZINE, INC.,  
et al.,

Plaintiffs,

v.

EASTMAN KODAK COMPANY,

Defendant.

CV 80-0561-IH


C E R T I F I C A T E

I hereby certify that I am a duly appointed, qualified,  
and acting Federal Court Reporter of the United States District  
Court for the Central District of California.

I further certify that the foregoing 44 pages are a  
true and correct transcript of the proceedings had in the  
above-entitled cause on Monday, September 22, 1980.  
and that said transcript is a true and correct transcription  
of my stenographic notes.

Dated at Los Angeles, California, this

29th day of September, 19 80.

  
XAVIER MIRELES  
Federal Court Reporter

CONSTITUTIONAL PROVISIONS AND STATUTES

**TEXT OF AMENDMENTS TO THE  
CONSTITUTION**

**AMENDMENT [I]**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

**AMENDMENT XIV**

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## TITLE 18

### **§ 1461. Mailing obscene or crime-inciting matter**

Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and—

Every article or thing designed, adapted, or intended for producing abortion, or for any indecent or immoral use; and

Every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for producing abortion, or for any indecent or immoral purpose; and

Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means abortion may be produced, whether sealed or unsealed; and

Every paper, writing, advertisement, or representation that any article, instrument, substance, drug, medicine, or thing may, or can, be used or applied for producing abortion, or for any indecent or immoral purpose; and

Every description calculated to induce or incite a person to use or apply any such article, instrument, substance, drug, medicine, or thing—

Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section or section 3001(e) of title 39 to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than \$5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than \$10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

The term "indecent", as used in this section includes matter of a character tending to incite arson, murder, or assassination.

### **§ 1462. Importation or transportation of obscene matters**

Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—

(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character; or

(b) any obscene, lewd, lascivious, or filthy phonograph recording, electrical transcription, or other article or thing capable of producing sound; or

(c) any drug, medicine, article, or thing designed, adapted, or intended for producing abortion, or for any indecent or immoral use; or any written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, how, or of whom, or by what means any of such mentioned articles, matters, or things may be obtained or made; or

Whoever knowingly takes from such express company or other common carrier any matter or thing the carriage of which is herein made unlawful—

Shall be fined not more than \$5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than \$10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

**§ 1465. Transportation of obscene matters for sale or distribution**

Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined not more than \$5,000 or imprisoned not more than five years, or both.

The transportation as aforesaid of two or more copies of any publication or two or more of any article of the character described above, or a combined total of five such publications and articles, shall create a presumption that such publications or articles are intended for sale or distribution, but such presumption shall be rebuttable.

When any person is convicted of a violation of this Act, the court in its judgment of conviction may, in addition to the penalty prescribed, order the confiscation and disposal of such items described herein which were found in the possession or under the immediate control of such person at the time of his arrest. Added June 28, 1935, c. 190, § 3, 69 Stat. 183.

TITLE 28

**§ 2201. Creation of remedy**

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 or a proceeding under section 505 or 1146 of title 11, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

TITLE 42

**§ 1983. Civil action for deprivation of rights**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

CALIFORNIA PENAL CODE

**§ 311.2 Sending or bringing into state for sale or distribution; printing, exhibiting, distributing or possessing within state; exemptions**

(a) Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, or prints, with intent to distribute or to exhibit to others, or who offers to distribute, distributes, or exhibits to others, any obscene matter is guilty of a misdemeanor.

(b) Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, or prints, with intent to distribute or to exhibit to others for commercial consideration, or who offers to distribute, distributes, or exhibits to others for commercial consideration, any obscene matter, knowing that such matter depicts a person under the age of 18 years personally engaging in or personally simulating sexual intercourse, masturbation, sodomy, bestiality, or oral copulation is guilty of a felony and shall be punished by imprisonment in state prison for two, three, or four years, or by a fine not exceeding fifty thousand dollars (\$50,000), in the absence of a finding that the defendant would be incapable of paying such a fine, or by both such fine and imprisonment.

(c) The provisions of this section with respect to the exhibition of, or the possession with intent to exhibit, any obscene matter shall not apply to a motion picture operator or projectionist who is employed by a person licensed by any

city or county and who is acting within the scope of his employment, provided that such operator or projectionist has no financial interest in the place wherein he is so employed.

(d) Except as otherwise provided in subdivision \* \* \* (e), the provisions of subdivision (a) or (b) with respect to the exhibition of, or the possession with intent to exhibit, any obscene matter shall not apply to any person who is employed by a person licensed by any city or county and who is acting within the scope of his employment, provided that such employed person has no financial interest in the place wherein he is so employed and has no control, directly or indirectly, over the exhibition of the obscene matter.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HUSTLER MAGAZINE INC., a corporation, )  
and CHIC MAGAZINE, INC., a )  
corporation, )

Plaintiffs-Appellants, )

vs. )

EASTMAN KODAK COMPANY, a corporation, )

Defendant-Appellee. )

APPELLANTS' BRIEF

1. ISSUES PRESENTED FOR REVIEW. This appeal raises the following issues:

1.1. Does censorship of speech in the form of pictures<sup>1/</sup> "based upon fear of criminal prosecution"<sup>2/</sup> under federal and state laws constitute state action<sup>3/</sup> by one who has received state and federal trademark and patent grants?

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<sup>1/</sup> In this case the pictures are in the form of transparencies. Pictures are within the ambit of protection of the First Amendment of the United States Constitution ("First Amendment"). N. 7 in Erznoznik v. City of Jacksonville, 422 U.S. 205, 211, 95 S.Ct. 2268, 2273 (1975). "[P]lays, motion pictures and photographs are protected forms of expression, Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502, 72 S.Ct. 777 (1952)."<sup>\*</sup> St. Martin's Press, Inc. v. Carey, 440 F.Supp. 1196, 1204 (S.D.N.Y. 1977). Magazines are likewise protected, and are presumptively protected material under the First Amendment. Penthouse Intern., Ltd., v. McAuliffe, 610 P.2d 1353, 1359 (5th Cir. 1980). "It is of no significance that expression which is protected by the First Amendment takes place in a commercial setting. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 83 S.Ct. 631 (1963)."<sup>\*</sup> La Rue v. State of California, 326 P.Supp. 348, 354 (C.D. Calif. 1971).

<sup>2/</sup> Trial court's finding. (Excerpt ("Ex.") 389:25.)

<sup>3/</sup> The second count of the instant Complaint is brought under §1983 which requires that the challenged conduct be (Cont'd)

1.2. If pictures are confiscated by a film processor, acting by reason of state and federal laws purportedly requiring such confiscation, without due process or compensation, is a magazine publisher who owns the pictures entitled to a determination of the constitutionality of the application of such laws where the pictures have not yet been subjected to editorial process from which it is determined if the picture should be published, if so what portion, if so in what context within the individual article, and if so the overall content of the magazine?

2. STATEMENT OF THE CASE.

2.1. NATURE OF THE CASE. Appellants ("Plaintiffs") seek damages and injunctive relief under 42 U.S.C. §1983 ("§1983") and the First and Fourteenth Amendments to the Constitution of the United States ("Amendment(s)") by reason of Appellee's ("Defendant" or "Kodak") interference with

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3/ (Cont'd) done "under color of any statute, ordinance, regulation, custom or usage, of any State or Territory." "The under color of law requirement of §1983 has been treated as the equivalent of the state action requirement of the Fourteenth Amendment." Adams v. Southern Calif. First Nat. Bank, 492 F.2d 324,329 (9th Cir. 1973). For purposes of determining whether a private party is subject to prohibitions of the Amendments to the Constitution, "state action" includes both federal action and action by one of the several states (Simkins v. Moses H. Cone Memorial Hospital, 323 F.2d 959,967 (4th Cir. 1963)), but might technically better be described generically as "governmental action" (footnote 5, Jackson v. Statler Foundation, 496 F.2d 623,627 (2nd Cir. 1974)). Defendant concedes that in light of the third count, seeking recovery based upon the First and Fourteenth Amendments, the determination of governmental action (state action) must consider not only the involvement of the State of California, but also the United States. (Ex. 84:17.) Acknowledging the Jackson statement that "governmental" would be a better descriptive word, since the words "state action" as including both federal and State actions have been repeatedly so used, we shall refer to "governmental action" or "state action" interchangeably to include both federal and State action.

Plaintiffs' exercise of their rights of free speech through Defendant's refusal to return Plaintiffs' pictures to Plaintiffs on the basis of §311.2 of the California Penal Code ("§311.2") and 18 U.S.C. §§1461, 1462 and 1465 ("§§1461-5") and Plaintiffs further seek a declaration that §§311.2 and 1461-5 cannot be applied so as to subject a film processor to criminal prosecution by reason of returning pictures to the owner for possible subsequent use in a magazine.

2.2. COURSE OF PROCEEDINGS. Plaintiffs filed their Complaint and Defendant filed its Answer. The Complaint is in four counts, the first of which is for anti-trust violations, the second is under §1983, the third is for violation of First and Fourteenth Amendment rights and the fourth is for declaratory relief. Pursuant to court order, counsel met to discuss a discovery program. Within a few days thereafter, and prior to the initiation of any discovery (and none has been undertaken), Defendant filed a motion for summary judgment. On September 22, 1980, the trial court announced its decision to grant the motion as to the second, third and fourth counts and to grant the motion (to dismiss) the first count, with leave to amend within ten days. The Court ordered that the transcript of those proceedings would constitute its findings and conclusions. (Ex. 402:25.)

2.2.1. Appealable Order. On September 29, 1980, the district court entered its order dismissing count 1 and granting summary judgment as to counts 2, 3 and 4. (Ex. 407.) Plaintiff did not amend. On November 14, 1980, final judgment was entered. (Ex. 412.)

2.2.2. Timeliness. Because of uncertainty as to

whether the order was intended as a final judgment,<sup>4/</sup> Plaintiffs timely filed a Notice of Appeal on October 28, 1980 (Docket No. 80-5861) with respect to the September 29, 1980 order (Ex. 415), and thereafter a Notice of Appeal with respect to the final judgment (Docket No. 80-6077) on December 15, 1980 (Ex. 417). On January 22, 1981 this Court ordered consolidation of the two appeals.

2.3. NINTH CIRCUIT RULE 13.

2.3.1. Jurisdiction--District Court. The second count seeks redress by virtue of actions under color of State law. The district court had subject matter jurisdiction thereof under 28 U.S.C. §1343(3). The third and fourth counts arise under the First Amendment and with respect to federal laws and the district court had subject matter jurisdiction under 28 U.S.C. §1331.

2.3.2. Jurisdiction--Court of Appeals. This appeal is from a final judgment. This Court has jurisdiction under 28 U.S.C. §1291.

2.3.3. Attorney's Fees. Although 42 U.S.C. §1988 provides for an award of attorney fees in the Court's discretion, without stating the need for a showing of bad faith, frivolousness or vexation, in addition to the trial court's not making any such award, we believe the cases interpreting the section require such a showing. If nonetheless Defendant again seeks an award of attorney fees from this Court, then as a protective measure, we do likewise.

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<sup>4/</sup> A stipulation by Plaintiffs and Defendant was proposed to the district court to clarify that it was not, but such stipulation was rejected. (Ex. 421.)

2.4. STATEMENT OF FACTS. Plaintiffs gave film to Defendant for developing. Defendant refused to return the developed pictures. (Ex. 365:38.) Defendant has adopted a policy and practice of confiscating film delivered to it for the purpose of developing if it determines the film to be obscene. (Ex. 103:11-104:9, 106 and 107.) Plaintiffs are unable to obtain quality processing from other sources. (Ex. 279:14, 296:5, 301:19, 306:16, 310:22.) Defendant's practice was adopted because of its fear of prosecution under, and therefore under color of, both federal and State laws. (Ex. 400:90.)<sup>5/</sup>

Defendant's developing film for a publisher is merely an early intermediate step in Plaintiffs' publication process (Ex. 274:15-278:21) and Defendant is aware of that fact (Ex.

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5/ Defendant's own evidence states that: "Because of Federal and State laws relating to pornography Eastman Kodak does not wish to handle pictures that show sexually explicit conduct. . . . Film sent to Kodak for processing which depicts such subject matter will not be returned because of the potential legal problems mentioned above." (Ex. 106.)

"There are State and Federal Statutes which prohibit the distribution of pictures depicting certain types of sexually explicit conduct. When Kodak discovers pictures in a customer order depicting such conduct, it cannot return those pictures to the customer without risking criminal prosecution for violating the law. Kodak will not return such pictures to the customer." (Ex. 107.) (Emphasis added.)

Defendant's proposed finding of fact No. 7 in which Plaintiffs joined (Ex. 171 and 315) recites that its practice was adopted "for the purpose of avoiding the injury and expense that would result if Kodak and/or its employees were accused of violating the obscenity laws". Defendant makes the same concession in seven different affirmative defenses in its Answer (Ex. 18-21) and in admitting Plaintiffs allegations that its confiscation was done by reason of risk of criminal prosecution under §311.2 (Ex. 14 and 15). Defendant's evidence (Ex. 102:19 to 103:25) and argument in brief (47:13-17, 48:12-49:2, 50:4-22, 54:6-12, 74:24-75:7, 79:15-20, 86:18-87:23 and 92:15-21) are the same.

124:21.) Although Defendant has the pictures 6/ (and Plaintiffs have not seen them) Defendant's motion neither attaches nor describes the withheld pictures.7/

Plaintiffs' evidence (Ex. 276-278) shows that none of the following is known: (1) how the transparencies Defendant has refused to return would have been altered before publication, (2) which of the transparencies would have been used at all, (3) what the size of the pictures in the magazine would be, (4) the content of the text of article in which the pictures would appear, or (5) the overall content of the magazine. Defendant by footnote to its brief (Ex. 73) without any supporting foundation in any sworn statement refers to an attachment which purportedly contains copies of other publications by the Plaintiffs which obviously do not include the transparencies which Defendant has withheld.8/

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6/ Plaintiffs submitted clear evidence that while the pictures held by Defendant may be under others' names, Defendant is withholding films belonging to Plaintiffs. (Ex. 289 to 293, 310:8, 312 and 313.) The trial court found that Defendant has retained and refused to deliver the pictures (Ex. 365:25), and Defendant at oral argument accepted this finding (Ex. 366:9).

7/ Plaintiffs do not believe that the contents of such transparencies is relevant in this litigation much less in this motion. Obviously no one can say what the film never even presented to Kodak (because of Kodak's confiscation practice) would have shown.

8/ Assuming the attachments to Defendant's counsel's brief were evidence, and that they were the product of Plaintiffs, viewing other magazines published by Plaintiffs is of no value. First, they do not demonstrate whether these (or any other) particular pictures in Defendant's hands would ever be used for the above reasons. Secondly, in United States v. Tupper, 564 F.2d 1294, 1297-1298 (9th Cir. 1977), this Court stated that evidence "that both the sender and the recipient of the shipment were known dealers in sexually explicit materials; that one of the suspects in the case had previously been convicted of an obscenity offense and was currently under indictment for another; and that the clerk in the (Cont'd)

### 3. ARGUMENT.

3.1. STANDARD OF REVIEW. This Court in Reiniger v. City of Phoenix, 625 F.2d 842,843 (9th Cir. 1980)

stated the standard of review as follows:

#### "STANDARD OF REVIEW

"A reviewing court will affirm a grant of summary judgment only if it appears from the record, after viewing all evidence and factual interferences in the light most favorable to the appellant, that there are no genuine issues of material fact and that the appellee is entitled to prevail as a matter of law."

In an action under §1983, a defendant moving for summary judgment has the burden of foreclosing all possibility that the plaintiff could prevail, and it is the burden of the moving party to "establish the absence of a genuine issue" and not upon the opposing party to raise same and "even if no opposing evidentiary matter is presented." Adickes v. S. H. Kress and Company, 398 U.S. 144,157, 159,160 90 S.Ct. 1598,1608,1609 (1970).

The foregoing standard of review is consistent with the elementary rules applicable to motion for summary judgments which the trial court did not follow: the burden is upon the moving party to show absence of genuine issue, the inferences must be drawn in favor of opposing party, the evidence and legal theories must be viewed most favorably to opposing party and the court may not weigh conflicting affidavits of inferences.<sup>8/</sup>

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8/ (Cont'd) consignee bookstore described similarly labeled films as 'hard core' do not constitute evidence of the motion picture film under consideration."

9/ "If under any reasonable construction of the (Cont'd)

3.2. CONTENTIONS - SUMMARY. Defendant's notice of

motion (Ex. 26) and summary of arguments (Ex. 51)

raises four points in support of motion as directed to the second, third and fourth counts: as a matter of law and viewing all evidence and inferences most favorably to Defendant (1) there is no state action to justify relief under the second or third counts (Ex. 29:6 and 52:4), (2) as to the declaratory relief fourth count there is no actual controversy (Ex. 29:19 and 53:26), (3) Defendant was unable to locate pictures under Plaintiffs' name (Ex. 30:1), and (4) a claim for replevin would be adequate relief for Plaintiffs (Ex. 54:14). The third was specifically rejected by the trial court. (N. 6 above.) As to the last, the evidence submitted by Plaintiffs shows that relief in the form of getting back stale pictures is wholly useless (Ex. 274-284) and Defendant's assertion to the contrary

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9/ (Cont'd) evidence and any acceptable theory of law, one would be entitled to prevail, the summary judgment against him cannot be sustained.'" Garner-Bare Company v. Munsingwear, Inc. 650 F.2d 975,980 (9th Cir. 1980). "As the moving party, respondent had the burden of showing the absence of a genuine issue as to any material fact, and for these purposes the material it lodged must be viewed in the light most favorable to the opposing party." Adickes v. S. H. Kress and Co., 398 U.S. 144,157, 90 S.Ct. 1598,1608 (1970). These principles have been repeatedly relied upon by this Court in reversing summary judgments. Bell v. Cameron Meadows Land Company, \_\_\_ F.2d \_\_\_, 82 L.A.D.J.D.A.R. 773 (9th Cir. Feb. 22, 1982); Reed v. Lockheed Aircraft Corp., 613 F.2d 757,759 (9th Cir. 1980); Hoffman v. Babbitt Bros. Trading Co., 203 F.2d 636,637 (9th Cir. 1953); and U.S. v. Western Electric Co., 337 F.2d 568,572 (9th Cir. 1964). "In ruling on a motion for summary judgment, it is not the function of the court to resolve existing factual issues through a 'trial by affidavits.' (United States v. Diebold, Inc., (1962) 369 U.S. 654, 82 S.Ct. 993. Lane Bryant, Inc. v. Maternity Lane, Ltd., of California, (9th Cir. 1949) 173 F.2d 559,565.) The court is to determine whether a genuine issue of material fact exists, viewing all evidence and factual inferences 'in the light most favorable to the party opposing the motion.'" Ramirez v. National Distillers and Chemical Corp., 586 F.2d 1315,1318 (9th Cir. 1978).

merely raises a triable issue of fact.

As to the remaining points Plaintiffs contend that both individually and collectively Defendant's acting as a censor under compulsion of State and federal laws, by virtue of State and federal trademarks and patents, preclude finding that Defendant has proved as a matter of law that there is no genuine issue as to the presence of state action in connection with its confiscation of Plaintiffs' pictures. Plaintiffs further contend that Defendant has not proved as a matter of law that there is a collusion between it and Plaintiffs demonstrating an absence of adversity to negate jurisdiction for declaratory relief.

Plaintiffs further contend that if Defendant is to be permitted to confiscate Plaintiffs' pictures by reason of its fear of prosecution under application the relevant statutes, then Plaintiffs must be afforded the opportunity to challenge the constitutionality of such application by the action for declaratory relief, for otherwise Plaintiffs would be left remediless even though such application of the statutes were unconstitutional.

Finally Plaintiffs contend that Defendant is not immune from these claims, that Plaintiffs did not waive their claims and the motion, made prior to any discovery, is premature.

3.3. DEPENDANT DID NOT SHOW ABSENCE OF EVIDENCE OF STATE ACTION. As to counts two and three Defendant's motion (Ex. 81:6) and the trial court's granting thereof (Ex. 389:10) are based upon the contention that as a matter of law there is no state action. If the lack of genuine issue on this subject exists, the conclusion must be that

Defendant's actions are state actions. According to Defendant itself, they are compelled by state and federal laws.<sup>10/</sup>

We agree with Defendant that a showing of "significant governmental action and involvement" is required. (Ex. 82:9.) The evidence, however, demonstrates that not only was the government involved, it was the catalyst for Defendant's actions by compelling the same. (N. 5 above.)

Defendant's claim that it did not act by reason of compulsion of law is premised on the subjective statements that its policy was not formulated at the request of law enforcement authorities or for the purpose of enforcing any laws. (Ex. 87:24.) Yet in the next sentence Defendant concedes that its practice of refusing to return certain pictures was motivated by the desire to avoid being charged with violation of laws.

3.3.1. State Action Arises From Compulsion of Statutes. State action exists when a party is acting under compulsion of law. Adickes v. Kress & Co. 398 U.S. 144, 90 S.Ct. 1598 (1970); Robinson v. State of Florida, 378 U.S. 153, 84 S.Ct. 1693 (1964); Peterson v. City of Greenville, S.C., 373 U.S. 245, 83 S.Ct. 1119 (1963); and Doe v. Charleston Area Medical Center, Inc., 529 F.2d 638 (4th Cir. 1975).

In Adickes, the defendant refused to serve lunch to the plaintiff at defendant's restaurant. The plaintiff sued to recover damages under §1983. In reversing summary judgment,

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<sup>10/</sup> Even were that the issue not determined as a matter of law in favor of Plaintiffs, it surely cannot be determined against Plaintiffs as a matter of law in face of the evidence showing such state action.

the Supreme Court stated (upper case being Court's emphasis):

"Although this Court has not explicitly decided the Fourteenth Amendment state action issue,... underlying the Court's decisions in the sit-in cases is the notion that the State is responsible for the discriminatory act of a private party when the State, by its law, has compelled the act. As the Court said in Peterson v. City of Greenville, 373 U.S. 244 (1963): 'When the state has commanded a particular result, it has saved to itself the power to determine that result and thereby 'to a significant extent' has 'become involved' in it'. Moreover, there is much support in lower court opinions for the conclusion that discriminatory acts by private parties done under the compulsion of state law offend the Fourteenth Amendment. In Baldwin v. Morgan, supra, the Fifth Circuit held that '[t]he very act of posting and maintaining separate [waiting room] facilities when done by the [railroad] Terminal as commanded by these state orders is action by the state.' The Court then went on to say: 'As we have pointed out above the State may not use race or color as the basis for distinction. IT MAY NOT DO SO BY DIRECT ACTION OR THROUGH THE MEDIUM OF OTHERS WHO ARE UNDER STATE COMPUSSION TO DO SO.'...

"For state action purposes it makes no difference of course, whether the racially discriminatory act by the private party is compelled by a statutory provision or by a custom having the force of law -- in either case it is the State that has commanded the result by its law." 398 U.S. at 170-171. 90 S.Ct. at 1615. (Emphasis added.)

In the present case, Kodak claims that it is required to confiscate certain materials submitted to it because failure to do so would subject Kodak and its employees to criminal prosecution under §311.2, 1461-5. What could be a clearer case of compulsion of law?

In Robinson, supra, the defendants' convictions for trespass were reversed because the owner's decision not to serve Negroes was merely encouraged by a regulation adopted by the Florida legislature, requiring that in places where Blacks were employed or accomodated, separate toilets be provided. The Supreme Court found this to be a sufficient state involvement to constitute state action, because the requirement of separate facilities placed an added burden upon restaurants

serving both Whites and Blacks. If the owner's enforcing his ownership rights was subject to the Fourteenth Amendment, all because of the mere regulation which encouraged the discrimination, then Kodak's confiscation done under compulsion of state and federal laws must be subject to the First and Fourteenth Amendments.

Once the compulsion of statute exists, the subjective motivation for Defendant's act becomes irrelevant. In discussing Peterson, supra, the court in Robinson, supra, stated:

"[A] Greenville ordinance which made it unlawful for restaurants to serve meals to white persons and colored persons in the same room or at the same table or counter. In Peterson the city argued that the manager's refusal to serve Negroes was based on his own personal preference, which did not amount to 'state action' forbidden by the Fourteenth Amendment. But we held that the case must be decided on the basis of what the ordinance required people to do, not on the basis of what the manager wanted to do. We said: 'when a state agency passes a law compelling persons to discriminate against other persons because of race, and the State's criminal processes are employed in a way which enforces the discrimination mandated by that law, such a palpable violation of the Fourteenth Amendment cannot be saved by attempting to separate the mental urges of the discriminators'". 378 U.S. at 155-156, 84 S.Ct. at 1695. (Emphasis added.)

According to Kodak it is likewise compelled by law to confiscate Plaintiff's transparencies. Kodak's argument (concerning which there is conflicting evidence) that this does not amount to state action because it unilaterally adopted its practice (Ex. 53:19) must be equally unavailing.

Doe v. Charleston, supra is extremely similar to the case at bar. The plaintiff sought declaratory and injunctive relief against a hospital for refusing to allow the plaintiff's physician to perform an abortion at the defendant's private

hospital. The defendant's policy stemmed from fear of criminal prosecution under a state law prohibiting abortion unless necessary to save the life of another. In finding "state action" for purposes of §1983 the Court stated (with emphasis added):

"Since state involvement through a custom having the force of law satisfies the 'color of law' requirement of 42 U.S.C. §1983, a fortiori the statute in this case meets the requirement... In this case, a letter from Mr. Arnwine, president of CAMC, set forth the hospital's policy and the motivation for that policy as follows: 'The present policy... with respect to performance of abortions at its hospital facilities is to literally adhere to the mandate set forth in Chapter 61, Article 2, Section [8] of the West Virginia Code. As you are aware, this statute limits the performance of abortions in the State of West Virginia to those instances where such act is done in good faith with the intention of saving the life of such woman and child...'

"It seems clear that the anti-abortion hospital policy rests firmly upon what was thought to be the compulsion of state law. Thus the hospital acted 'under color of law'... 529 F.2d at 643-644.

There is no question but that Defendant acted under compulsion of state and federal statutes. The trial court concluded that Defendant's "refusal to provide service and to deal based on fear of prosecution under state law does not constitute state action" even though it found that the Defendant's "policy for not developing this type of film rests on the state obscenity laws and Defendant's fear of prosecution thereunder". (Ex 389:13-390:12.) Based on the above authorities we contend that the exact opposite conclusion must be reached even without consideration of trademark and patent grants, or the censorship activity itself.

The trial court's reliance upon cases and issues briefed by neither of the parties demonstrates great industry, but incurred the here-realized risk of improper interpretation

going unchallenged because of the inability of counsel to respond.

3.3.1.1. Adams Not Compulsion Case. The trial court cited Adams v. Southern Calif. First Nat. Bank, 492 F.2d 324 (9th Cir. 1973) for the proposition that race discrimination cases are not applicable except in other "race" cases. We respectfully argue that the trial court's reliance thereupon for its rejection of the above authorities is misplaced for several reasons. First, the repossession by self-help in Adams was an authorized alternative, but was not compelled by state law.<sup>11/</sup>

3.3.1.2. Compulsion Doctrine Cases Not Limited To Race Cases. Secondly, the authorities Plaintiffs had cited to which the trial court was responding

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<sup>11/</sup> In Adams the plaintiffs claimed only that state laws "encouraged" and "sanctioned" the alleged wrongdoing, not that such laws compelled the same. 492 F.2d at 328-329. At pages 330 and 334, this Court pointed out that rather than compelling the self-help repossession, the relevant statute made same only an "alternative". In discussing Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 92 S.Ct. 1965 (1972), this Court in Adams focused on the fact that the Court in Moose Lodge found that the effect of the law there in question did not amount to "establishing or enforcing of discriminatory guest policies". 492 F.2d at 334. Moose Lodge upon which Defendant, and the Court in Adams, relied is clearly distinguishable from this case. There was no statute which compelled the challenged activity. In distinguishing Public Utilities Commission v. Pollak, 343 U.S. 451, 72 S.Ct. 813 (1952) (not a race case) in which state action was found (see analysis of Pollak in footnote 1, of dissent of Adams, supra at 340) the Supreme Court in Moose Lodge stated: "Unlike the situation in Public Utilities Commission v. Pollak, 343 U.S. 451, 72 S.Ct. 813 (1952), where the regulatory agency had affirmatively approved the practice of the regulated entity after full investigation, the Pennsylvania Liquor Control Board has neither approved nor endorsed the racially discriminatory practices of Moose Lodge." 407 U.S. at 175-176 n. 3, 92 S.Ct. at 1973. If "approval" or "endorsement" is enough for state action surely compelling the intrusion upon Plaintiff's free speech must suffice.

were not limited to race cases. Doe v. Charleston, supra. When this was noted during oral argument the trial court (Ex. 400:1) responded that this Circuit has rejected that decision of the 4th Circuit. This response is in error. While it is true that this Circuit has rejected one of the two bases for the decision in Doe, (i.e. that receipt of Hill-Burton funds creates state action, a rejection acknowledged in Doe) the Doe decision was based on a second ground (acknowledged by Defendant, Ex. 352:24) that the statute compelled the activity by the defendant at the risk of criminal prosecution, the exact circumstance as is here present. 529 F.2d at 638. This Court has not rejected that alternative ground, and where there are two grounds for a decision, neither is relegated to mere dictum and each have precedential value.<sup>12/</sup>

3.3.1.3. Actual Adams Holding. Thirdly, the Adams holding was not as stated by the trial court. The sole expressions to which the trial court could possibly have been averting appear at 492 F.2d pages 329 and 333. At page 329, this Court merely expressed uncertainty as

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<sup>12/</sup> "Where an appellate court decision rests on two or more grounds, none can be relegated to the category of obiter dictum." Dragor Shipping Corp. v. Union Tank Car Co., 371 F.2d 722,726 (9th Cir. 1976) citing Woods v. Interstate Realty Co., 337 U.S. 535,537, 69 S.Ct. 1235 (1949). "It has long been settled that all alternative rationales for a given result have precedential value. 'It does not make a reason given for a conclusion in a case obiter dictum, because it is only one of two reasons for the same conclusion.'" McLellan v. Mississippi Power and Light Co., 545 F.2d 919,925 (5th Cir. 1977) citing Richmond Screw Anchor Co. v. United States, 275 U.S. 331,340, 48 S.Ct. 194,196 (1928). "Where there are two grounds of decision upon either of which an appellate court may rest its decision and it adopts both, the ruling on neither is obiter dictum, but each is the judgment of the court and of equal validity with the other." Morehouse Manufacturing Corp. v. J. Strickland and Co., 407 F.2d 881,888 (C.C.P.A. 1969).

to whether the same test for state action applied to both equal protection and due process cases, and then it proceeded to analyze the facts as though the same "significantly involved" test set forth in these equal protection cases applied, and relied upon Supreme Court race decisions.<sup>13/</sup>

At page 333 this Court questioned the controlling nature of race cases, but then followed same immediately by a statement in footnote 23 that "This should not result in a hierarchy of rights, or different state action tests for due process and equal protection..." 492 F.2d at 333. The Adams language to which the trial court referred was characterized as merely a "suggestion", not a holding. 492 F.2d at 341.

3.3.1.4. Limited Distinction in Adams. Fourth, even if Adams were considered as adopting a hierarchy of rights (as suggested by the trial court, but rejected specifically in Adams), the only distinction from race cases possibly drawn by Adams was not as to First Amendment cases (as here) but rather only to an "economic due process case" (footnote 24) where the "creditor remedies were based on economically reasoned grounds of very long standing". 492 F.2d at 333. The statutes here involved do not involve either "economically reasoned grounds" nor any other grounds "of very long standing" nor do they restate that which were "a part of the common law" as was found in Adams. Id. at 330,333,334.

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<sup>13/</sup> Adickes v. S.H. Kress & Co., cited at page 330, Burton v. Wilmington Parking Authority cited at page 331, Moose Lodge No. 17 v. Irvis cited at pages 331, 332 and 334, Evans v. Abney cited at pages 331 and 336, and Griffin v. Maryland cited at page 337.

3.3.1.5. No Supreme Court Support for Hierarchy.

Fifth, even assuming that the Adams case had been intended to hold that a lesser governmental involvement is required to find state action in a race discrimination case (the "different state action tests" decried by Adams itself in footnote 23), there is no Supreme Court support for such a view, and the logic leads to a contrary conclusion as acknowledged in said footnote 23.

3.3.1.6. Conclusion Re Adams. For each of these reasons the trial court's reliance upon Adams as a basis for rejecting the cases we cited is misplaced.<sup>14/</sup>

3.3.1.7. Grafton and Young Cases - Race Case Reliance. The trial court next justified its refusal to follow "race" cases based on Grafton v. Brooklyn Law School, 478 F.2d 1137 (2nd Cir. 1973) and Young v. American Mini Theatres, Inc., 427 U.S. 50, 96 S.Ct. 2440 (1976). (Ex. 390:13 et seq.) The trial court's reliance upon these cases is improper for each of several reasons. First again note that the Doe, supra is not a race case.

3.3.1.8. Actual Holding - Grafton. Although there is dicta from the Grafton decision suggesting the hierarchy of rights and different state action tests for different rights which this Court eschewed in Adams, the holding in Grafton dealt with the argument that the state's granting of \$400.00 for each degree the defendant awarded

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<sup>14/</sup> No discussion of Adams would be complete without noting the strong dissent both by Judge Byrne, and by Judge Huffstedler from the denial of hearing en banc.

caused defendant's actions to amount to state action. To this contention the court responded: "We do not regard the \$400 payment as sufficient to carry on its back the particular constitutional rights that plaintiffs here advance." 478 F.2d at 1142. Plaintiffs' grounds for contending that state action is here involved are not remotely similar in Grafton's Claim and, therefore, the Grafton holding is not arguably pertinent.

3.3.1.9. Young - Majority. Even as stated by the trial court the most which can be drawn from the Young case is that "four members of the Supreme Court" have stated that "boarderline obscenity material is not entitled to the same panoply of protection as are other First Amendment-type materials." (Ex. 390:18 to 390:24.)

3.3.1.10. Young Not Concerned With State Action.

The Young case neither involved nor discussed the question of state action. In Young the plaintiff had challenged a land use ordinance prohibiting certain locations for new adult movie theatres. There was no issue of state action; the action was against the state. Whether Kodak's actions could be justified is a separate issue and would have no bearing upon the determination of whether state action were involved. The trial court erroneously confused two separate legal issues. Young never suggested that the nature of the grievance had any bearing on the issue of state action.

3.3.1.11. No Showing Of Obscenity. Since Defendant offered no evidence of the content of the confiscated pictures, the reference to borderline material is

made without any supporting evidence.<sup>15/</sup> (N. 8 above)

3.3.1.12. Validity of Statutes. The trial court also supported its finding of a lack of state action and rejection of cases we cited on the basis that the statutes under consideration in the "race" cases we cited were clearly invalid on their face. (Ex. 391:6.) This statement fails to support the conclusion of a lack of state action. First, while such statement may appear in some decision, we do not find it in Peterson, supra, Robinson, supra or Adickes, supra. Secondly, the statement does not respond to

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15/ While the context of the trial court's reliance upon Young was solely with respect to its determination of an absence of state action, we note that Young is equally inapplicable to the question of the violation of First Amendment rights. First, none of the statements of the lead opinion constitute the holding of the case because the fifth justice whose concurring opinion made up the majority did not concur with those views, but rather joined in the decision upholding the ordinance as a proper land use regulation. 427 U.S. at 60 and 73, 96 S.Ct. at 2447 and 2454. Secondly, the plaintiff in Young acknowledged its being within the coverage of the ordinances, but claimed they were nonetheless vague. 427 U.S. at 59, 96 S.Ct. at 2447. The Supreme Court recognized a right to challenge a statute on the grounds of vagueness even when not vague in its application to the plaintiff, but stated that this right was a limited one. It was in this context of the issue of standing that the statement to which the trial court here alluded was made, to wit: the right to assert a claim of vagueness in application on behalf of third parties is not recognized where "borderline" material is involved. As the trial court recognized, that expression did not receive majority support. n.l 427 U.S. at 73, 96 S.Ct. at 2453. Plaintiffs are not urging a position on behalf of other persons; they are asserting a claim on their own behalf, and therefore, the expression to which the trial court alluded is not applicable. Thirdly, to the extent that the First Amendment is dealt with, the Court in Young treated the limitation as one of time place and manner, a long recognized exception. 427 U.S. at 63, 96 S.Ct. at 2448-9. That limitation upon free speech is not here involved. Therefore, in no respect does Young support the trial court's decision. Young warned that statements regarding free speech should not be read "literally and without regard for the facts of the case in which it was made." 427 U.S. at 65, 96 S.Ct. at 2450.

Doe, supra, which does not involve race discrimination. Finally, the issue of state action is determined by the involvement of the state, not the validity or invalidity of the statute compelling the action.

3.3.1.13. Conclusion Re Compulsion. An analysis of the Adams, Grafton, and Young cases demonstrates that none of them justify the trial court's rejection of the authorities we cited or the conclusion that as a matter of law there was an absence of state action in Defendant's refusal to return the pictures to Plaintiffs under compulsion of state and federal statutes. The suggestions that prior approval of a different application of those statutes, or the risk of prosecution, as a matter of law precludes a finding of governmental action are equally unsupportable. At a minimum Defendant's acting under compulsion of state law raises a genuine issue of governmental action.

3.3.2. State Action Arises from Trademark and Patent Grants. A second ground for contending a genuine issue of state action is that the State and federal trademark and patent rights granted to Defendant cause sufficient governmental involvement to amount to state action.

Plaintiffs' evidence is that the unique superiority of Defendant's product is a result of its ownership of numerous patents and trademarks granted by the United States and the various States. (Ex. 271-313.) Although Defendant devotes much of its evidence to support the proposition that alternative processors capable of equal product are available, Defendant offered no evidence either that other processors do in fact produce equal product (and Plaintiffs' evidence is to

the contrary) or to refute the contention that superior or otherwise, Defendant's mode of operations is attributable to patents and trademarks previously awarded to it. Similarly, while Defendant devoted four pages of argument to the contention that its trademark and patent rights granted by the government do not constitute state action (Ex. 84 et seq.), conceding along the way that this issue has never been decided by any court (Ex. 87:1), Defendant does not so much as suggest that it neither had such rights or that they did not contribute to its processing films.<sup>16/</sup>

If involvement by reason of leasing of public property [Burton v. Wilmington Parking Authority, 365 U.S. 715, 81 S.Ct. 856 (1961)]<sup>17/</sup> is sufficient to constitute state action, we contend that the granting of trademark and patent rights is equally sufficient.

Defendant argues that "the mere grant of a corporate charter is a ministerial government act which does not...make the latter's business...'state action'." (Ex. 84:25.) It may be true that granting corporate charters may be ministerial but granting patents is not, and Defendant's attempted analogy to

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<sup>16/</sup> It is Defendant's burden to show absence of state action. §3.1., above. After Plaintiffs' opposing memorandum distinguished the corporate charter-permit-license cases which Defendant attempted to analogize to its patent and trademark rights, Defendant did not even discuss the subject in its reply memorandum. (Ex. 251-254 and Ex. 350-352.)

<sup>17/</sup> Courts in other circuits have also found state action from the grant of funds to assist in the construction of housing [McQueen v. Druker, 438 F.2d 781 (1st Cir. 1971)], exemption from taxation [McGlotten v. Connally, 338 F.Supp. 448 (D.C. 1972)], and the grant of funds for construction of a hospital [Simkins v. The Moses H. Cone Memorial Hospital, 323 F.2d 959 (4th Cir. 1963)].

the corporate charter cases is therefore improper.<sup>18/</sup> The Patent Office officers perform more than ministerial acts in reviewing a patent application, in awarding rights and powers pursuant to the Constitution, and in entering into a contract with the patentee regarding the scope and exercise of these constitutional powers.<sup>19/</sup>

The charter - license cases cited by Defendant are further inapplicable to trademarks and patents because unlike the former, the latter are the result of a direct grant of powers and rights pursuant to the U.S. Constitution (Art. I, §8, cl.8), are issued not for private benefit but for the public good, and in rewarding invention the rights and welfare of the community must be fairly dealt with. See Sears Roebuck

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<sup>18/</sup> Discretion and judgment is exercised by the officers of the Patent Office at every step in the patent procedure until such time as the bargain is struck with the patentee. Applications are subjected to extensive review to determine whether the invention meets the requisite "Novelty" and "Now-Obvious Subject Matter" criteria. 35 U.S.C. §§102, 103. The reviewing officer must state his reasons for rejecting an application. 35 U.S.C. §132. If after rejection, the applicant persists in his claim, the reviewing officer must re-examine the application. 35 U.S.C. §132. In certain circumstances holders of competing patent claims may join in these proceedings. 35 U.S.C. §135. An applicant whose claim(s) have been twice rejected may appeal to the Board of Appeals within the Patent Office. 35 U.S.C. §134. If still dissatisfied, an applicant may further appeal to the Court of Customs and Patent Appeals or to the District Court for the District of Columbia. 35 U.S.C. §§141, 145, 146.

<sup>19/</sup> Jackson v. Metropolitan Edison Co., 419 U.S. 345, 95 S.Ct. 449 (1974), relied on by Defendant (Ex. 86:10) is further distinguishable first, because the Court in Jackson doubted that the state had ever granted or guaranteed the power Company a monopoly (419 U.S. at 352, 95 S.Ct. 454), whereas the grant of a patent or trademark is clearly a grant of monopoly and secondly, because the Supreme Court there asserted that the governmentally created rights must have a close relationship to the challenged authority, a fact here true. The same distinction was drawn in Taylor v. St. Vincent's Hospital, 523 F.2d 75,77 (9th Cir. 1975).

& Co. v. Stiffel, Co., 376 U.S. 225, 84 S.Ct. 784 (1964),  
Griffith Rubber Mills v. Hoffer, 313 F.2d 1 (9th Cir. 1963).

While Defendant's assertion that the federal patents and trademarks are irrelevant to the second count (Ex. 84:9) is correct, Defendant overlooks that federal action is relevant to the third and fourth counts, and State trademarks support the claim of state action as to the second count.

Independently, we urge that these patents and trademarks create state action. Even were this contention in error, we contend that in combination with the compulsion of the obscenity statutes, and Defendant's acting as a censor, they cause state action to exist.

3.3.3. State Action Arises From Defendant's Exercise of Censorship Function. Here Defendant acts as a censor in deciding which pictures it will return to the owners. (See nine separate affidavits filed by Defendant commencing at Ex. 147.) One of the recognized bases for finding state action is that the act is one which has "traditionally been the function of the State." Hall v. Garson, 430 F.2d 430,439 (5th Cir. 1970) [seizure of property to satisfy lien]; Marsh v. Alabama, 326 U.S. 501, 66 S.Ct. 276 (1946) [functions of town]; Terry v. Adams, 345 U.S. 461, 73 S.Ct. 809 (1953) and Smith v. Allwright, 321 U.S. 649, 64 S.Ct. 757 (1944) [primary elections]; North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 95 S.Ct. 719 (1975); Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983 (1972) and Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 460, 89 S.Ct. 1820 (1969) [enforcement of credit remedies].

Defendant asserts that this Court has not as yet

adopted the public function basis and that this Court so stated in Melara v. Kennedy, 541 P.2d 802 (9th Cir. 1976). (Ex. 89:21.) Yet this Court in Melara did list same as a factor (id at 802) and specifically distinguished rather than rejecting Hall v. Garson, supra, (id at 807) just as it did in Adams, supra, where it concluded that the activity involved in Hall (seizure of property after entering a private person's home) "had historically been a function of the State of Texas" while "repossession is not a state function". 492 P.2d at 336. That distinction cannot be drawn as to censorship because it too has been "historically a function of the state", a conclusion Defendant seemingly concedes. (Ex. 90:19.)

Defendant's attempts to establish as a matter of law the inapplicability of this basis for finding state action fails. First Defendant asserts that Defendant's censorship "was not formulated (a) at the request of, in cooperation with, or with the knowledge of law enforcement authorities or (b) with the intent or purpose of participating in the enforcement of the obscenity laws..." That fact was equally true in the Hall, Marsh and election cases cited above, and thus cannot be the distinguishing factor. The fact that no governmental agency asked Kodak to do what it is doing doesn't mean that Kodak's confiscation doesn't constitute state action. Formal government demand or request is not required.

Kodak's assertion that it does not act as a censor (Ex. 87:22) is belied by the true facts. Kodak reviews the pictures and transparencies and decides which ones it will return to the owner thereof. It does so on the basis of the content of the film and its evaluation of whether that content is or is not

obscene. What else could be involved in censorship?

Kodak contends that it has adopted this policy to avoid prosecution under the law. (Ex. 88:14.) Rather than negating state action the authorities (§3.3.1. above) demonstrate that same proves state action, and none of the cases suggest this as an exception to the state function test. Further Peterson, supra, and Doe, supra found state action notwithstanding risk of criminal prosecution and the former held also that the asserted motivation is not determinative once it is shown that the conduct was done pursuant to state policy or statute. Here Kodak concedes that its conduct was done pursuant to, and under compulsion of, the obscenity statutes.

Defendant's attempted distinction of the Marsh case supra on the basis that its "position would be analogous to the company town [in Marsh] only if it appeared that Kodak was an officially sanctioned censor..." (Ex. 89:8) is fallacious. There is no holding in Marsh that the company town was officially sanctioned to bar the distribution of religious literature, and that was not the premise for the decision.

Admittedly, Kodak's practice does not totally bar Plaintiffs' publications. There is nothing cited by Kodak to support its conclusion (Ex. 89:16) that only if the entire publication were barred could Kodak's actions be deemed to be governmental action. Available alternatives do not save infringement on free speech. (See §3.4.2.3. below.)

Defendant relies heavily on Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 98 S.Ct. 1729 (1978). That case specifically notes that the traditional governmental function basis is not limited to company town and election cases and

holds only that "settlement of disputes between debtors and creditors" does not come within that basis. 436 U.S. at 161-162, 163, 98 S.Ct. at 1736, 1737.

Defendant seeks to expand the reference in Flagg Bros. to "commercial transaction" to mean that there can be no state action in commercial transaction. The relationships in Adickes as well as North Georgia, Fuentes, Sniadach, supra involved as much a commercial transaction as here. Flagg Bros. dealt only with the "dispute resolving" aspect of a commercial transaction, an aspect not here involved.

Additionally, in Flagg Bros. the Court (436 U.S. at 160, 98 S.Ct. at 1735) notes that the statute pursuant to which the lien rights were exercised provided for adequate remedies for improper exercise of such rights. The obscenity statutes do not provide for any such remedies, and other than this action, there is no meaningful remedy available to Plaintiffs.

Nor can the absence of a State employee in the litigation be treated as the vital distinguishing factor. No State official was a party in Adickes, or Doe, supra, or in McQueen v. Druker, 438 F.2d 781 (1st Cir. 1971), Simkins v. The Moses H. Cone Memorial Hospital, 323 F.2d 959 (4th Cir. 1963) or McGlotten v. Connally, 338 F.Supp. 448 (D.C. 1972).

Perhaps the most vital distinction of Flagg Bros. is demonstrated by its discussion of Adickes, supra:

"Our cases state 'that a State is responsible for the... act of a private party when the State, by its law, has compelled the act.' Adickes, supra, [citation]. This Court, however, has never held that a State's mere acquiescence in a private action converts that into that of the State...

"Here, the state of New York has not compelled the sale of a bailor's goods, but has merely announced the

circumstances under which its courts will not interfere with a private sale." 436 U.S. at 164-166, 98 S.Ct. at 1737-1738. (Emphasis added.)

Here there is not merely "acquiescence". Kodak contends that it is acting to avoid prosecution under the statutes and if one accepts Kodak's application, then in every meaningful way those statutes compel Kodak's confiscation policy. That element wholly distinguishes this case from the Flagg and other cases upon which Kodak relies.

The trial court's findings and conclusions do not discuss this basis either individually or as an element along with the other bases herein discussed.

3.4. DEFENDANT DID NOT PROVE ABSENCE OF JUSTICIABLE CONTROVERSY FOR DECLARATORY RELIEF. Defendant's position regarding the fourth count (Ex. 54:20) would force Plaintiffs to incur the enormous risks and injury which arise when Plaintiffs submit film to Defendant and then the transparencies are not returned, and to file repeated lawsuits seeking the mere return of these by then stale transparencies. An action for mere possession would be fruitless in that by the time transparencies are returned they would be of little, if any, value. (Ex. 273:7-284:4.) Declaratory relief is the proper means of obtaining a definitive adjudication of rights, thereby avoiding litigation each time a wrong is committed. See Roe v. Wade, 410 U.S. 113,126, 93 S.Ct. 705,713 (1973); Doe v. Charleston Area Medical Center, Inc., 529 F.2d 638,644 (4th Cir. 1975). This case presents a classic example of an action "capable of repetition, yet evading review". Roe v. Wade, supra, 410 U.S. at 125.

According to Defendant, application of §§311.2 and

1461-5 requires it to act as a censor to determine which pictures may legally be returned to Plaintiffs. Plaintiffs contend that if such statutes so require, then they violate Plaintiffs' First and Fourteenth Amendment rights and a declaration of the invalidity of such application should be made. Especially is this necessary if Plaintiffs are denied relief under the second and third counts.

3.4.1. There Is Justiciable Case. The trial court's granting the summary judgment motion on the declaratory relief (28 U.S.C. §2201) count was based on the conclusion that "there is no case or controversy" (Ex. 392:19) but rather this was "a collusive action" (Ex. 393:5) because "Kodak tells us it has no interest in upholding either set of laws" (Ex. 392:25). The authorities cited not only by Defendant, but also by the trial court, as support for reaching this conclusion as a matter of law are inapplicable, in that each is premised on a finding of a collusive action or moot case. Typical is the statement from Moore v. Charlotte-Mecklenburg Board of Education, 402 U.S. 47,48, 91 S.Ct. 1292,1293 (1971) quoted in Defendant's moving papers (Ex. 94:28) that "We are thus confronted with the anomaly that both litigants desire precisely the same result...". There is surely not one shred of evidence or argument by Defendant that it joins, or is in collusion, with Plaintiffs in their attack on the validity of the application of the laws here in question. To the contrary, Defendant's Answer and Motion for Summary Judgment prove adversity. Avoidance of collusion is assured by 28 U.S.C. §2403. The trial court's conclusion that this would be "a collusive action" is in error.

The trial court relied upon U.S. v. Johnson, 319 U.S. 302, 63 S.Ct. 1075 (1943) and Rutolo v. Rutolo, 572 F.2d 336 (1st Cir. 1978). (Ex. 393:24.) In Johnson the landlord defended a tenant's action on the ground that the Emergency Price Control Act of 1942 was unconstitutional, and the Supreme Court upheld the government's claim of collusion in a motion to reopen the case. 28 U.S.C. §2403 protects against this risk, and there is no evidence of collusion here.

In Rutolo, supra, a creditor moved to disqualify a retired bankruptcy referee from serving as attorney for the debtor in possession. After denial of the motion the government intervened, following which the creditor withdrew its objection, and the retired referee ceased to represent the debtor. Nonetheless the government appealed the denial of the disqualification motion. The Court of Appeals held that the matter had become moot and that there remained no justiciable issue by reason thereof. Further the Court found that for the government to proceed it had to have an independent basis, and that once the parties had resolved their differences, the government had no such basis, and further that its decision would merely be an advisory opinion. None of the facts in Rutolo are even tangentially similar to those here and the decision in no way supports a conclusion that there is not a dispute requiring declaratory relief in this case.<sup>20/</sup>

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<sup>20/</sup> The other authorities cited by Defendant are equally inapplicable. In Golden v. Zwickler, 394 U.S. 103, 89 S.Ct. 956 (1969), the Supreme Court found that the case or controversy had become moot. In Mendez v. Heller, 530 F.2d. 457 (2d Cir. 1976), the plaintiff sought to challenge a New York two year residency requirement prior to actually having attempted to file for divorce in the appropriate (Cont'd)

While Defendant argues that there is a lack of concrete adverseness (Ex. 91:25), that there is a lack of substantial controversy between the parties (Ex. 92:2) and that it has no interest in defending the constitutionality of the challenged laws (Ex. 93:16), in virtually the next breath, however, Defendant concedes that it "is only interested in obeying the laws as they exist".

Isn't adversity proved by Defendant's Answer and the manner in which it has pursued this case? If Kodak had no interest in defending the constitutionality of the statutes and if all it wanted to do was be secure against possible prosecution, why did it answer the fourth count?

3.4.2. Prior Determinations - Tracking. The trial court stated that these statutes have been "adjudicated as valid in criminal cases and other contexts" (Ex. 392:11.) and that the state and federal statutes of which "Kodak is concerned" "track the decisions of the Supreme Court." (Ex. 391:12.) While the statutes may "track", the application by Kodak does not. Here Defendant claims the compelled application of the statutes requires its prior

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20/ (Cont'd) New York State Courts. The courts are more ready to review threatened deprivations of First Amendment Rights than in other situations. Zwickler v. Koota, 389 U.S. 241, 254, 88 S.Ct. 391, 399 (1967); Wolff v. Selective Service Local Board No. 16, 372 F.2d 817 (2nd Cir. 1967). In contrast to the situation in Mendez, all possible events have occurred to create an actual dispute between the parties. Plaintiffs have tendered film for processing to defendant and defendant has refused to return the films to Plaintiffs. Thus, the "exigent adversity" mentioned in Mendez exists. Finally, the contention that Granfield v. Catholic University of America, 530 F.2d 1035 (D.C. Cir. 1976) (Def.Br. 68:1) requires the joinder of representatives of the bodies enacting the statutes is in error as demonstrated by other cases cited by Defendant itself.

restraint of free speech in the pre-editorial process which the authorities state is improper. No case has yet upheld a statute's compelling a private person to interfere with free speech before publication or that these statutes should be so interpreted, and the censorship cases require procedural due process which the application Kodak claims is compelled would violate. Kodak's assertedly compelled application of the statutes fails to "track", or comply with, the authorities in five separate respects: (1) prior restraint at a pre-publication editorial stage is unconstitutional, (2) the pictures in pre-publication are not legally capable of being tested for obscenity, (3) Plaintiffs' magazine must be judged as a whole and not merely pictures therefrom, (4) the Kodak tests applied do not comport with the constitutional requirements and (5) Plaintiffs' have not been afforded the procedural due process required for censorship.

#### 3.4.2.1. Censorship Limitations - Prior Restraint.

"We must start from the recognition that the films were presumptively protected by the First Amendment. Roaden v. Kentucky, 413 U.S. 496, 93 S.Ct. 2796 (1973). Since seizure of First Amendment-protected materials constitutes a form of prior restraint, the materials are entitled to special treatment..." United States v. Tupler, 564 F.2d 1294,1297 (9th Cir. 1977).

Defendant's policy of confiscation directly affects and threatens Plaintiffs' freedom of speech and press by precluding its expression. This constitutes a prior restraint of speech, for which the Supreme Court has acknowledged a deep distaste and which "comes to this Court bearing a heavy presumption against its constitutional validity." Bantam Books, Inc. v. Sullivan, 372 U.S. 58,70 83 S.Ct. 631,639 (1963) later quoted in New York Times Company v. U.S., 403 U.S. 713,714, 91 S.Ct.

2140,2141 (1971). See also Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546,553-554 95 S.Ct. 1239,1244 (1975) and Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900 (1940).

If Kodak is required by these statutes to confiscate films, then these statutes would impose the same evil which was struck down in the above cases. Plaintiffs' freedom of speech is subjected to "appraisal of facts, the exercise of judgment, and the formation of an opinion" by Kodak at the direction of the government, factors which characterize censorship. See Southeastern, supra, 420 U.S. at 558-9, 95 S.Ct. at 1246-7, in which the Court additionally stated:

"It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable."

Here the evidence shows that not only is it "difficult to know in advance what" Plaintiffs magazines will say or depict, its impossible.

In Near v. State of Minnesota, 283 U.S. 697,721, 51 S.Ct. 625,633 (1931) the Supreme Court struck down a statute "authorizing suppression" of materials. Here application of the statutes according to Defendant requires it to suppress the transparencies. The Court there stated that it was irrelevant whether the restraint was directly by the legislature or only indirectly. In Near the asserted justification for the prior restraint was the injury suffered from libelous publications. In this case the alleged injury is the publication of obscenity. Substituting obscenity for libel, the rule to be drawn from Near is (bracketed portions representing such substitutions):

"The recognition of authority to impose previous restraint upon publication in order to protect the community against the circulation of [obscene matter] necessarily would carry with it the admission of the authority of the censor against which the constitutional barrier was erected. The preliminary freedom, by virtue of the very reason for its existence, does not depend, as this court has said, on proof of [non-obscenity]. [citation.]

"Equally unavailing is the insistence that the statute is designed to prevent the circulation of [obscenity] which [is undesirable]. [T]he theory of the constitutional guarantee is that even a more serious public evil would be caused by authority to prevent publication."

The rule of Near applies in the case of disputes between private parties as it does in disputes between the government and a private party [Organization For A Better Austin v. Keefe, 402 U.S. 415, 418, 91 S.Ct. 1575, 1577 (1971) and Goldblum v. National Broadcasting Corp., 584 F.2d 904, 907 (9th Cir. 1979)], and freedom of speech and press applies to commercial as well as non-commercial speech [New York Times Company v. Sullivan, 376 U.S. 254, 256, 84 S.Ct. 710, 713 (1964) and Quinn v. Aetna Life & Cas. Co., 616 F.2d 38 (2nd Cir. 1980)].

The obscene content of films would not justify prior restraint. In Southeastern, supra, the plaintiff was denied the right to use public property to put on a live performance of a musical play. The lower court found the play to be obscene. The Plaintiff raised three arguments: (1) that the Defendant's refusal was an unlawful prior restraint, (2) that the wrong test of obscenity was applied and (3) that the record did not support the finding of obscenity. The Supreme Court responded: "We do not reach the latter two contentions, for we agree with the first." 420 U.S. at 552, 95 S.Ct. at 1243. Thus the Court declared the defendant's conduct was

unconstitutional regardless of whether the play was obscene. Once a prior restraint was found, the nature of the speech became insignificant.

Similarly, the nature of the transparencies here should be irrelevant. What the State cannot do directly it cannot do through the back door. If, as Kodak contends, it faces a risk of prosecution, then the statute which directs Kodak to engage in prior restraint must be declared unconstitutional in its application to a film processor, and Kodak's practices done to aid such prior restraint must be enjoined.

3.4.2.2. Pre-Publication Material Cannot Be

Censored. Plaintiffs and Defendant agree

that the film sent to Defendant by or for Plaintiffs is merely an early intermediate step in the process of Plaintiffs' publishing their magazines. (§2.4. above.) Defendant's threatened and actual confiscation of film directly intereferes with the Plaintiffs' editorial process and freedom of press by denying Plaintiffs films which they might use, and therefore, requires their use of other transparencies and inferior quality. Application of the statutes as asserted by Defendant requires it to enter the composing room of Plaintiffs to give directives as to the content of expression by Plaintiffs. On the alleged basis of federal and state laws, Defendant has therefore created its own prior restraint upon Plaintiffs' speech. The law with respect to such activity is well-stated in Goldblum, supra, 584 F.2d at 907:

"It is a fundamental principle of the first amendment that the press may not be required to justify or defend what it prints or says until after the expression has taken place. The Government has been prohibited from interfering with the editorial process by entering the

composing room to give directives as to the content of expression. The district court proceedings here intervened in the editorial process by ordering an official of the broadcasting company to produce a film just before its scheduled broadcast so that it could be examined for inaccuracies. A procedure thus aimed toward prepublication censorship is an inherent threat to expression, one that chills speech." (Emphasis added and citations omitted.)

In Goldblum the challenged order did not prevent or preclude publication. Rather it merely required divulgence to the court before publication. Nonetheless the order was reversed (within twenty-four hours). How much worse is Defendant's position here when its practice has resulted not only in chilling free speech but also in actual prevention of publication of the materials it has undertaken to censor.

"The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment." Pittsburgh Press Co. v. Pittsburgh Com'n on Human Rel., 413 U.S. 376, 390, 93 S.Ct. 2553, 2561 (1973). (Emphasis added.)

Because of the assertedly compelled application of the statutes, Defendant exercises "excessive caution" resulting in Plaintiffs loss of their freedom of speech. In Baggett v. Bullitt, 377 U.S. 360, 372, 84 S.Ct. 1316, 1323 (1964) the Supreme Court struck down a statute creating a prior restraint because it forced "[t]hose... sensitive to the perils posed by [the statute to] avoid the risk... by restricting their conduct to that which is unquestionable safe. Free speech may not be so inhibited."

In reversing a \$311.2 conviction the court in In Re Klor, 64 Cal.2d 816, 820, 821 (1966) stated:

"Without the requirement that the defendant be shown to have prepared the material with intent to distribute it in its obscene form, the statute would apply to matter

produced solely for the personal enjoyment of the creator or as a means for the improvement of his artistic technique. Such a statute would approach an interdiction of individual expression in violation of the First and Fourteenth Amendments. (See Griswold v. Connecticut (1965) 381 U.S. 479, 482 [85 S.Ct. 1678]; American Communications Assn. v. Douds (1950) 339 U.S. 382, 412 [70 S.Ct. 674].)

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"Nor does such conduct occur if the creator intends to purge the material of any objectionable element before distributing or exhibiting it. To hold otherwise would pose grave technical difficulties for the unconventional artist and would, because of the risk of criminal sanctions, tend to suppress experimental and tentative productions that might become, in finished form, constitutionally protected communication. '... [T]he Fourteenth Amendment requires that regulation by the States of obscenity conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line.' (Bantam Books, Inc. v. Sullivan (1963) 372 U.S. 58, 66 [83 S.Ct. 631].)"

#### 3.4.2.3. Available Alternative Means of

##### Publication Will Not Save A Prior

Restraint. The evidence shows a conflict as to whether alternatives are available to Plaintiffs. However, even were alternatives proved as a matter of law, it would not establish the absence of genuine issue of state action.

"Whether petitioner might have used some other, privately owned, theater in the city for the production is of no consequence. There is reason to doubt on this record whether any other facility would have served as well as these, since none apparently had the seating capacity, acoustical features, stage equipment, and electrical service that the show required. Even if a privately owned forum had been available, that fact alone would not justify an otherwise impermissible prior restraint. '[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.' Schneider v. State 308 U.S., at 163, 60 S.Ct., at 151." Southeastern, supra, 120 U.S. at 556, 95 S.Ct. at 1245.

If appropriate alternative theaters could not save the prior restraint in Southeastern, then alternative processors cannot save Kodak's prior restraint.

3.4.2.4. Must Consider Finished Whole Magazine.

Here Kodak at best is judging pictures which may or may not be included in a magazine and is not considering the entire magazine, because of course it can't. Such application of a statute is unconstitutional.

"[A]ppellant would view each separate article and pictorial presentation, to determine whether each 'work' in a 'volume' is obscene under the Miller test. We conclude that decisions of both the Supreme Court and this court require us to treat each magazine as a separate work that is to be taken as a whole." Penthouse Intern., Ltd. v. McAuliffe, 610 F.2d 1353, 1366-1367 (5th Cir. 1980).

If it is improper to view only entire articles, how much more so to view merely pictures from such articles.

In United States v. Tupler, supra the convictions were reversed because the search warrant did not meet constitutional requirements. The court there stated:

"The affidavit upon which the warrant was based described in some detail the photographic labels which were fixed to the film boxes... These labels did not necessarily bear any relationship to the content of the films...

"First Amendment standards require that any determination of obscenity be made considering the material as a whole...

"A single photographic print or 'out take' from a roll of motion picture film... could never establish probable cause to believe that the film 'taken as a whole, lacks serious literary, artistic, political, or scientific value.'" 564 F.2d at 1297. (Emphasis added.)

If a single "out take" cannot establish the obscenity of a motion picture, then surely a single picture which may never be used in a magazine cannot establish that the magazine "taken as a whole, lacks serious literary, artistic, political, or scientific value."

These cases follow the statements of Judge Hand in

U.S. v. One Book Entitled Ulysses, 72 F.2d 705,707 (2nd Cir. 1934) holding that the publication must be "taken as a whole". Judge Hand quoted from a prior decision of Judge Andrews in Halsey v. New York Society for Suppression of Vice, 234 N.Y. 1, 136 N.E. 219 as follows:

"In referring to the obscene passages, he remarked that: 'No work may be judged from a selection of such paragraphs alone. Printed by themselves they might, as a matter of law, come within the prohibition of the statute. So might a similar selection from Aristophanes or Chaucer or Boccaccio, or even from the Bible. The book, however, must be considered broadly, as a whole.' We think Judge Andrews was clearly right, and that the effect of the book as a whole is the test."

Nor may reference be made to prior publications of Plaintiffs. A restraint which "operates to suppress, on the basis of previous publications" is unconstitutional. Organization For A Better Austin v. Keefe, 402 U.S. 415,418, 91 S.Ct. 1575,1577 (1971). (Emphasis added) (See also n. 8 above.)

3.4.2.5. Kodak's Policy Does Not "Track". The standard for obscenity established in Miller v. California, 413 U.S. 15,25, 93 S.Ct. 2607,2615 (1973) is a three-pronged test including:

"(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." 413 U.S. at 25, 93 S.Ct. at 2615. (Emphasis added, citations omitted.)

As discussed under §§3.4.2.2. and 3.4.2.4. above, the transparencies are (if used at all) substantially altered prior to appearance in Plaintiffs' magazines. Textual material is also added. Yet, as noted, Defendant's assertedly compelled application of the statutes (Ex. 106-7) does not purport to

consider the whole magazine, thereby failing to comply with prongs (a) and (c) of this conjunctive test. Nor does Defendant's policy require depiction in a "patently offensive way" so as to meet the second prong. Kodak's policy (Ex. 106-7) does not "track" the case requirements for finding obscenity as to any of the three tests.

3.4.2.6. Procedural Due Process. Courts have imposed a substantial set of due process requirements upon censors. See Freedman v. Maryland, 380 U.S. 51, 85 S.Ct. 734 (1965); United States v. Thirty Seven (37) Photographs, 402 U.S. 363, 91 S.Ct. 1400 (1971); Blount v. Rizzi, 400 U.S. 410, 91 S.Ct. 423 (1971); Southeastern Promotions, supra, Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 88 S.Ct. 1298 (1968).

The basic due process requirements can be summarized as follows: (1) the standard for determining whether a work is obscene must comply with constitutional standards of obscenity and may not be vague, overly broad or imprecise; (2) the burden of proving that the work is unprotected expression must rest on the censor; (3) the censor, within a specified brief period, either issue a license or go to court to restrain the use of the allegedly obscene material; (4) any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to the preservation of the status quo for the shortest fixed period compatible with sound judicial resolution; (5) the censorship procedure must also assure a prompt final judicial decision to minimize the deterrent effect of an interim and possibly an erroneous denial of a license. Freedman, supra, 380 U.S. at 58-59; 85 S.Ct. at 739.

Interstate Circuit, supra, 390 U.S. at 684-689; 88 S.Ct. at 1303-1306.

Kodak has complied with none of the foregoing and Plaintiffs have been afforded none of the foregoing rights.

"There must be some judicial determination of obscenity before a seizure or 'constructive seizure' may occur." Penthouse, supra, 610 F.2d at 1359.

3.4.3. Conclusion Re Declaration Relief. For each of the foregoing reasons, Defendant's argument that as a matter of law declaratory relief should not be allowed is in error.

3.5. DEPENDANT HAS NO PRIVILEGE. Defendant complains (Ex. 351) and the trial court comments (Ex. 400:9) that were Defendant to return the pictures to Plaintiff Defendant would risk being accused of violating §§311.2 and 1461-5, and therefore the Defendant had what amounts to a "privilege" (Ex. 391:24).<sup>21/</sup> If the trial court's suggestion

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<sup>21/</sup> Defendant's conclusion that "transportation of unedited obscene film in interstate commerce is a federal offense" (Ex. 354:26) relying upon United States v. Levine 546 F.2d 658,667 (5th Cir. 1977) is incorrect for at least two reasons: First, the film transported in Levine was a "work print". Since the court accepted the final "release print" as evidence of the work print which the defendant had shipped, it is clear that the print which defendant did ship was a complete motion picture. It was not an unedited version. That must be contrasted with the facts shown here that it is highly unlikely that any particular picture that Defendant censors by refusing to return same would ever end up in a distributed magazine. Secondly, Levine at page 668 specifically states that "whether a motion picture film is obscene must be adjudged upon viewing it in its entirety." That is completely opposite to the contention that an unedited version can be legally the subject matter. Defendant's contention that prosecution of a film lab employee has already been determined as proper based upon Gold v. United States, 378 F.2d 588 (9th Cir. 1967) (Ex. 351) is in error. The participation by the defendant in Gold was far more than merely returning developed film. Additionally the film in Gold was a completed motion picture, not merely an intermediate step in the publication of a magazine.

of privilege is made to avoid "state action", then it was in error. Whether Defendant's past conduct is to be condoned because of a legitimate fear of prosecution under state and federal laws, does not negate a finding of state action as Defendant has contended and as the trial court has suggested (Ex. 88:14 and 390:9), but rather supports a finding of state action. Peterson v. City of Greenville, and Doe v. Charleston, Etc., supra.<sup>22/</sup>

If the contention is made (although not so stated in moving papers) to show an excuse for Defendant's violating Plaintiff's right of free speech, then if it be accepted, the only logical conclusion is to permit Plaintiffs to proceed in their attack on such an application of those sections. Surely the result cannot be that the government may do indirectly that which it could not do directly. Yet, if application of the statutes results in the censorship of Plaintiffs' speech in this manner, it indirectly constitutes an unconstitutional infringement upon Plaintiffs' right of free speech.

If Defendant is to be immunized against claims under the second and third counts because of the application of certain federal and state laws, then surely Plaintiffs are entitled to their day in court to demonstrate that such laws cannot legally be so applied. On the other hand, if such laws cannot be challenged by attacking their application in this

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<sup>22/</sup> Defendant's reliance upon Associates & Aldrich Company v. Times Mirror Company, 440 F.2d 133 (9th Cir 1971) and Avins v. Rutgers State University of New Jersey, 385 F.2d 151 (3rd Cir. 1967) (Ex. 356-358) is misplaced. Neither decision suggests that the defendant's practice in those cases was the direct result of a fear of prosecution under any law, or was a practice adopted to censor certain speech.

manner, then Plaintiffs must be permitted to seek relief by reason of such application. Defendant cannot have it both ways so as to deprive Plaintiffs of any meaningful remedy.

The uncontradicted evidence (Ex. 274-284) is clear that the remedy of obtaining pictures through a replevin action is virtually worthless. Defendant offers no evidence to refute same. The trial court's decision would enhance a "Catch-22" result (rather than avoid it as contended by Defendant, Ex. 351:17), to wit: Defendant is entitled to act as a censor by reason of the threat of state and federal laws without following the requirements set down by the case law applicable to censorship, and Plaintiffs are denied the right to obtain a declaration that such application of those laws is improper.

3.6. PLAINTIFFS DID NOT WAIVE CLAIMS. At Ex. 55-56 of its brief, Defendant argues that it is not obligated to return material depicting matters described in its notice because that notice constituted part of a contract between defendant and plaintiffs. The trial court inquired into this subject (Ex. 397:14) and we therefore discuss it.

3.6.1. Plaintiffs Did Not Agree To Kodak's Policy.

Paragraph 21 of Robert DeMarco's opposing affidavit (Ex. 299) states quite clearly that Plaintiffs never agreed to Defendant's confiscation policy. At a minimum, this raises a genuine issue of fact. Kodak contends that Plaintiffs are bound by Ex. 112 but there is no evidence even suggesting that it was ever presented to, or known by, Plaintiffs.

3.6.2. There Is No Waiver From Kodak's Notice.

"[Waiver] is a voluntary act and implies an abandonment of a right or privilege--an election to dispense with something of value or to forego some advantage which one

might, at his option, have demanded. In no case will a waiver be presumed or implied contrary to the intention of the party whose rights would be injuriously affected thereby, unless by his conduct the opposite party has been misled, to his prejudice, into the honest belief that such waiver was intended or consented to." Chase v. National Indemnity Co., 129 Cal.App.2d 853,858 (1954).

### 3.6.3. Contract of Adhesion Is Not Enforceable.

There is a genuine issue of fact as to whether or not the notice could be enforced even if it constituted a waiver. Assuming the notices formed a contract, it was one of adhesion. Even unambiguous provisions of a contract of adhesion will not be strictly enforced if they result in unreasonable, unjust, or unconscionable forfeitures or absurd results. See Schilk v. Benefit Trust Life Insurance Co., 273 Cal.App.2d 302 (1969); Steven v. Fidelity and Casualty Co., 58 Cal.2d 862 (1962); Cal.Civ.Code, §1670.5.

All the elements of an adhesion contract are present in this case.<sup>23/</sup> Kodak presents its terms and conditions for accepting material for processing in a standardized printed form which has been prepared by it. Kodak clearly is in a superior bargaining position to that of Plaintiffs or at least this is a genuine issue of fact. As Kodak itself contends, it will not accept material for processing unless customers comply

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<sup>23/</sup> The basic criteria for determining whether a contract is an adhesion contract include: (i) a contract presented in a standardize form; (ii) prepared by the party with superior bargaining power; (iii) due to such disparity and bargaining power the contract must be accepted or rejected on a "take-it-or-leave-it" basis by the weaker party; (iv) there is no realistic opportunity to bargain over terms; and (v) often arises in situations where the party preparing the contract has a monopoly (natural or artificial) in the desired goods or services. See Blair v. Pitchess, 5 Cal.3d 258,275-276 (1971); Adams v. Egley, 338 F. Supp. 614,620 (S.D.Cal. 1972); Wheeler v. St. Joseph's Hospital, 63 Cal.App.3d 345,356 (1976).

with its terms. Kodak's overwhelming position in the market for superior quality photofinishing and whether Plaintiffs must utilize the services of Kodak are clearly in dispute. As an adhesion contract, the contract between Kodak and plaintiffs would be subject to construction by the court. All ambiguities or questions pertaining to the impact and effect of various clauses would be construed against Kodak.

3.6.4. First Amendment Rights Are Not Waiveable.

First Amendment Rights such as Freedom of Speech are interests of society as a whole and cannot be waived, and even as to non-First Amendment rights, every reasonable presumption against waiver of fundamental constitutional rights must be made and such rights cannot be waived in a contract of adhesion and any waiver must be clear.<sup>24/</sup> Thus, in Fuentes, supra, the Supreme Court declared that the Florida and Pennsylvania pre-judgment replevin statutes were unconstitutional even though the debtor had agreed in writing that the seller could take back the merchandise in the event of default. There is clearly no language within the Kodak notice by which Plaintiffs purport to waive their constitutional rights. Plaintiffs received nothing additional from Kodak in consideration of the purported waiver

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<sup>24/</sup> Abington T.P. Pa. School District v. Shempp, 374 U.S. 203, 224-5, 83 S.Ct. 1560 (1963); Johnson v. Sanders, 319 F.Supp. 421, (D.C.Conn. 1970), aff'd 403 U.S. 955, 91 S.Ct. 2292 (1971); Fuentes v. Shevin, 407 U.S. 67, 95, 92 S.Ct. 1983, 2001-2002 (1972), Adams v. Egley, 338 F.Supp. 614, 620 (S.D.Cal. 1972) and Blair v. Pitchess, 5 Cal.3d 258, 274-276 (1971).

of these rights.<sup>25/</sup>

3.6.5. Conclusion Regarding Waiver. For each of the foregoing reasons, there are genuine issues of fact as to whether or not Kodak's notice could or did constitute a waiver of constitutional or other rights Plaintiffs had to their property and to publish the transparencies which Kodak has confiscated.

3.7. MOTION PREMATURE. Summary judgment should not be granted until such time as the party opposing the motion has had an adequate opportunity to conduct discovery.<sup>26/</sup> The foregoing rule is particularly true in situations where the facts necessary to oppose the motion are in the possession of the moving party, and here Defendant asserts its subjective intent is a material issue. Defendant's motion herein was made within a few days after counsel for the parties first met to discuss discovery and before any discovery had been taken. Thus, Defendant's motion was premature, and should therefore have been denied.

4. CONCLUSION - RELIEF REQUESTED. Kodak by virtue of its trademark and patent grants has by reason of application of obscenity laws injected itself into the editorial process of Plaintiffs' publications, as a censor. In

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<sup>25/</sup> Whether the material tendered by plaintiffs to Kodak for processing falls within the ambit of the material identified in Kodak's notice is still an open question.

<sup>26/</sup> Rule 56(f) of the Federal Rules of Civil Procedure. See also Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738, 96 S.Ct. 1848 (1976); Poller v. Columbia Broadcasting System, Inc. 368 U.S. 464, 82 S.Ct. 486 7 L.Ed. 2d 458 (1962); Timberlane Lumber Co. v. Bank of America N.T.S.&A. 549 F.2d 597 (9th Cir. 1976); Illinois State Employees Union Council 34 Etc. v. Lewis 473 F.2d 561, 565 n.8 (7th Cir. 1972).

so doing Defendant has acted under color of law; an absence of State action cannot be declared as a matter of law. This application of obscenity statutes, improperly places at risk those uninvolved with the publication itself resulting in Kodak's redefining obscenity in a manner never approved by any court, setting itself up as a censor to review without any court intervention the content of proposed photographs, confiscating those photographs it deems obscene and asserting it must do so under compulsion of law. Pursuing a declaration of the unconstitutionality of such application must be permitted. Plaintiffs cannot be relegated to a valueless common law action for return of stale pictures when it is the very existence of these laws whose application violates Plaintiffs' freedom of speech and press. While we contend the state action element has been proved as a matter of law, for purposes of this appeal we need only show that the trial court's decision, that as a matter of law there is an absence of state action, is in error. We pray that the judgment be reversed so as to reinstate the second, third and fourth counts.

DATED: March 31, 1982

Respectfully submitted,

RICHARD D. AGAY for  
COOPER, EPSTEIN & HUREWITZ, APC  
Attorneys for Appellants

(Excerpts under separate cover)

Nos. 80-5861 & 80-6077  
IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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HUSTLER MAGAZINE, INC., a corporation and CHIC  
MAGAZINE, INC., a corporation,

*Plaintiffs-Appellants,*

vs.

EASTMAN KODAK COMPANY, a corporation,

*Defendant-Appellee.*

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## APPELLEE'S BRIEF.

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### ISSUES PRESENTED FOR REVIEW.

1. Whether the district court correctly concluded that the policies and practices of Kodak of which plaintiffs complain constitute private action rather than state or governmental action within the meaning of 42 U.S.C. §1983 and the First and Fourteenth Amendments to the United States Constitution.

2. Whether the district court correctly concluded that the plaintiffs' claim against Kodak for declaratory relief as to the constitutionality of certain federal and state obscenity statutes lacks the concrete adverseness necessary to create a justiciable controversy within the meaning of the United States Constitution and the Federal Declaratory Judgment Act.

### STATEMENT OF THE CASE.

#### A. Procedural History.

Plaintiffs, publishers of Hustler and Chic Magazines, commenced this action February 13, 1980 by filing a complaint in the court below seeking injunctive relief, damages

and a declaratory judgment.<sup>1</sup> (EX 1-11.)<sup>2</sup> Plaintiffs alleged that defendant Kodak's policy and practice of refusing to return to its customers sexually explicit film and pictures developed therefrom (hereinafter referred to, collectively, as "sexually explicit pictures") violates the federal antitrust laws (first claim for relief), deprives plaintiffs of their right to freedom of speech in violation of 42 U.S.C. §1983 (second claim for relief), and deprives plaintiffs of rights protected by the First and Fourteenth Amendments (third claim for relief). Plaintiffs also alleged that they are entitled to a declaratory judgment against Kodak that certain state and federal obscenity statutes are unconstitutional (fourth claim for relief). On June 9, 1980, Kodak moved for summary judgment on the grounds that the case presents no genuine issue of material fact and that defendant is entitled to judgment as a matter of law, supporting its motion by affidavits. Plaintiffs opposed the motion, filing affidavits in support of their opposition.

On September 22, 1980, the district court, after hearing, announced its decision granting Kodak's motion for summary judgment as to the plaintiffs' second, third and fourth claims for relief and dismissing the first claim for failure to state a claim upon which relief can be granted, with leave to amend within ten days. (EX 360-403.) The district court reduced its order to writing and entered it in the docket on

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<sup>1</sup>On February 13, 1980 plaintiffs also filed action no. C313377 in the Superior Court of the State of California for the County of Los Angeles against Kodak and Doe defendants alleging wrongful possession and detention by Kodak of color film transparencies belonging to plaintiffs and seeking similar injunctive and declaratory relief under state laws as that sought in the instant action. Kodak answered the complaint in the state court action and that case is presently at issue.

<sup>2</sup>Items of the clerk's record will be cited to herein by parenthetical reference to page numbers of the excerpts prepared by the Appellants, followed where appropriate by internal line numbers (e.g., "(EX 19: 25-27)").

September 30, 1980. (EX 407-10.) Plaintiffs failed to file an amended complaint as to the first claim for relief within the time allowed. Consequently, on November 14, 1980, final judgment was entered in favor of Kodak. (EX 412-14.)

**B. Ninth Circuit Court of Appeals' Rule 13(b).**

**1. District Court's Subject Matter Jurisdiction.**

Plaintiffs' asserted basis for federal subject matter jurisdiction in the district court over the antitrust claims alleged in the first count of the complaint is 28 U.S.C. §1337(a) and 15 U.S.C. §§15 and 26. (EX 2: 4-6.)

Plaintiffs' asserted basis for federal subject matter jurisdiction in the district court over the second count of the complaint alleging deprivation of civil rights under color of state law pursuant to 42 U.S.C. §1983 is 28 U.S.C. §1343(3). (EX 5: 25-27.)

Plaintiffs' asserted basis for federal subject matter jurisdiction in the district court over the third count of the complaint alleging deprivation of federal constitutional rights is 28 U.S.C. §1331. (EX 7: 22-24.) However, the district court held that plaintiffs' second and third claims do not involve sufficient governmental involvement to constitute claims within the court's federal subject matter jurisdiction.

Plaintiffs' asserted basis for federal subject matter jurisdiction in the district court over the fourth count of the complaint seeking declaratory relief is 28 U.S.C. §1331. (EX 8: 28.) However, the district court held that this count lacked the concrete adverseness, as between plaintiffs and Kodak, necessary to create a justiciable actual controversy

within the meaning of the Declaratory Judgment Act (28 U.S.C. §2201) and article III, section 2, clause 1 of the United States Constitution. (EX 392-94.)

**2. Jurisdiction in the Court of Appeals.**

Kodak agrees with the statement of plaintiffs (AOB 4).

**3. District Court's Judgment Is Appealable.**

Kodak agrees with the statement of plaintiffs (AOB 3).

**4. The Appeal Is Timely.**

Kodak agrees with the statement of plaintiffs (AOB 3-4).

**C. Statement of Relevant Facts.**

The facts relevant to this appeal, as shown by the parties' pleadings and the affidavits they have filed, are undisputed. Plaintiffs, publishers of magazines which include sexually explicit material, are subsidiaries of Larry Flynt Publications, Inc. (EX 384: 3-12; 272: 10-12.) Kodak is a private corporation which markets various kinds of photographic film, operates ten film processing laboratories nationwide dealing with the general public, and provides processing chemicals and technical assistance to non-Kodak film processing laboratories. (EX 112-25.)

In mid-1978, Kodak assigned Norman D. McClaskey of its corporate legal department to review Kodak's policy with respect to returning to customers sexually explicit pictures, the content of which is discovered during the routine processing of customer orders in Kodak's film processing laboratories. In particular, Mr. McClaskey was assigned the task of determining whether and when returning such pictures might subject Kodak and/or its employees to a risk of being charged with or criminally prosecuted for violating state or federal obscenity laws. (EX 101: 5-15.)

Mr. McClaskey concluded that Kodak and/or its employees risk criminal prosecution if they knowingly deliver to customers sexually explicit pictures which depict subject matter which may be subject to regulation under constitutionally valid federal and state obscenity statutes. With respect to such pictures and the obscenity statutes of concern, Mr. McClaskey determined that the controlling United States Supreme Court decision is *Miller v. California*, 413 U.S. 15 (1973). In *Miller* and subsequent cases, the Court stated that patently offensive representations or descriptions of the following subject matter can be regulated by state and federal obscenity laws without violating the free speech guarantees of the United States Constitution:

- 1 (a) Ultimate sexual acts, normal or perverted, actual or simulated;
- (b) Masturbation, excretory functions, and lewd exhibition of the genitals.

*Miller v. California*, *supra*, 413 U.S. at 25.<sup>3</sup>

Mr. McClaskey further determined that federal obscenity laws and state obscenity statutes in those states in which Kodak operates film processing laboratories regulate the distribution of the types of pictures that fall within the *Miller* guidelines and had been held constitutionally valid as so applied. (EX 101-02.)

Based upon Mr. McClaskey's analysis and recommendations, Kodak adopted the uniform policy of not returning to customers sexually explicit pictures which are discovered during the routine processing of customer orders to depict subject matter which falls within the *Miller* guidelines. Kodak's policy was formulated unilaterally and was based on the independent business consideration of avoiding the risk of injury and/or expense that would result if Kodak and/

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<sup>3</sup>The criteria stated in this ruling are referred to herein as "the *Miller* guidelines".

or its employees were accused or convicted of violating constitutionally valid state and federal obscenity laws. Kodak's policy was *not* formulated (a) at the request of, in cooperation with or with the knowledge of law enforcement authorities or (b) with any intent or purpose on the part of Kodak of participating in the enforcement of the obscenity laws or of censoring or suppressing the publication or distribution of sexually explicit film, pictures or magazines. (EX 103-105.)

Kodak's formulated policy was reduced to a written notice to customers reading as follows:

#### NOTICE

Because of Federal and State laws relating to pornography, Eastman Kodak does not wish to handle pictures that show sexually explicit conduct. Our Legal Department has informed us that processing pictures for customers depicting the following subject matter may subject Kodak to potential criminal prosecution:

- (a) Ultimate sexual acts, normal or perverted, actual or simulated.
- (b) Masturbation, excretory functions or lewd exhibitions of genitals.

Film sent to Kodak for processing which depicts such subject matter will not be returned because of the potential legal problems mentioned above. (EX 106.)

Kodak directed employees of its film processing laboratories to give copies of this notice to customers in the latter part of 1978 and the first part of 1979. (EX 104: 1-5.) On December 8, 1978, a copy of this notice was given by Kodak's Hollywood, California film processing laboratory to Robert DeMarco, who represented himself as the Photo Director of Hustler Magazine. Mr. DeMarco read the notice at that time and told Kodak's representative that he would

inform Larry Flynt as to Kodak's policy. (EX 109: 13-25.) Mr. DeMarco does not deny receiving such notice.<sup>4</sup>

Plaintiffs allege in their complaint that from February 13, 1979 through February 13, 1980, Kodak refused to return to plaintiffs a number of pictures developed from film transmitted to Kodak's processing laboratories by plaintiffs for development. (EX 3: 19-22.) Kodak submitted uncontroverted evidence that no pictures were withheld by its film processing laboratories during the relevant time period from orders submitted under the name of either plaintiff. (EX 147-65.) However, for purposes of this appeal, as in the district court, Kodak accepts plaintiffs' assertion that sexually explicit pictures withheld by Kodak's film processing laboratories during the relevant time period, although submitted under the names of individual photographers, belonged to plaintiffs. (EX 366: 9-10.) Plaintiffs' posited ownership of certain sexually explicit pictures withheld by Kodak during the relevant time period furthers Kodak's contention that it has a contractual right, pursuant to its policy notice effectively communicated to plaintiffs, not to return such pictures.

Two factual matters deserve special emphasis. *First*, plaintiffs seek to make it appear that Kodak withholds sexually explicit pictures from plaintiffs for the purpose of preventing plaintiffs from using these materials in their magazines; plaintiffs characterize this alleged interference with the production of their magazines as a "prior restraint" forbidden by the First Amendment. The record not only

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<sup>4</sup>The subject matter of film submitted to Kodak for processing can be ascertained only after that film has been developed. Accordingly, to implement its policy Kodak must rely on advance notice such as that given to Mr. DeMarco and, in the event such notice goes unheeded, on its refusal to return certain sexually explicit pictures to customers when Kodak discovers such pictures.

does not support these assertions — it belies them. Kodak withholds *Miller*-type films and pictures from *all* customers, not just publishers. Kodak does so not to prevent the customers from using the pictures either to gratify themselves or to display to others, but to protect Kodak and its employees from criminal charges and prosecution based on the very act of mailing or otherwise delivering the film and pictures to Kodak's customers.<sup>5</sup> Kodak seeks not to play the censor but to avoid violation of the law.

*Second*, the fact that this is true makes irrelevant another of plaintiffs' principal contentions: that Kodak's actions are unjustified because Kodak has no way of knowing whether plaintiffs will publish any particular picture, or will alter it before doing so, or will publish the picture in the context of a magazine containing other material of redeeming social value. This argument misses the point: if Kodak and/or its employees are prosecuted for returning sexually explicit pictures to plaintiffs in violation of an obscenity law, all that will be before the trier of fact will be the pictures themselves, unedited and without ameliorating context. It would be no defense in such a criminal action to show that after the pictures were returned by Kodak to these plaintiffs, they did not use the pictures, or that before publication they

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<sup>5</sup>18 U.S.C. §§1461, 1462 and 1465 prohibit knowingly mailing or transporting in interstate commerce any "obscene, lewd, lascivious, or filthy" material and impose criminal sanctions upon violators.

California Penal Code §311.2(a) provides, in relevant part, as follows: Every person who knowingly sends or causes to be sent, . . . , or in this state possesses, prepares, publishes or prints, with intent to distribute or to exhibit to others, or who offers to distribute, distributes or exhibits to others, any obscene matter is guilty of a misdemeanor.

These statutes which Kodak seeks to avoid violating have been held to pass constitutional muster under the *Miller* guidelines. *Hamling v. United States*, 418 U.S. 87 (1974) (re 18 U.S.C. §1461); *Bloom v. Municipal Court*, 16 Cal.3d 71, 127 Cal.Rptr. 317, 545 P.2d 229 (1976) (re California Penal Code §§311 and 311.2).

modified those parts of the pictures that violate the *Miller* guidelines, or that the issues of *Hustler* and *Chic* Magazines in which the pictures appeared contained sufficient material of redeeming social value to cause the magazines, taken as a whole, to be protected by the First Amendment.

## ARGUMENT.

### I.

#### STANDARD OF REVIEW ON APPEAL.

In reviewing the grant or denial of a summary judgment motion, the appellate court applies the same principles that are initially employed by the district court under Federal Rule of Civil Procedure 56(c). Accordingly, the reviewing court must answer the following two questions: (1) is there any genuine issue of material fact and (2) if not, then viewing the evidence and the inferences which may be drawn therefrom in the light most favorable to the adverse party, is the moving party entitled to prevail as a matter of law? *Federal Deposit Insurance Corp. v. First National Finance Co.*, 587 F.2d 1009, 1010-11 (9th Cir. 1978); *Radobenko v. Automated Equipment Corp.*, 520 F.2d 540, 543 (9th Cir. 1975). Thus, the standard of review applicable to this appeal is *de novo* review. *Bank of California, N.A. v. Opie*, 663 F.2d 977, 979 (9th Cir. 1981).

Plaintiffs' statement that it is Kodak's burden to show absence of state action (AOB 21 fn. 16) is simply untrue. To establish a claim for relief against a private party under 42 U.S.C. §1983 and/or the First or Fourteenth Amendments, a plaintiff must show that that defendant's actions constitute state or governmental action. *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 155 (1978); *Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 150 (1970); *United States v. Price*, 383 U.S. 787, 794 fn. 7 (1966). Moreover, the determination of whether the requisite state or governmental action exists is a legal conclusion to be drawn from the undisputed facts. Such a conclusion of law is freely reviewable on appeal. *Societe de Conditionnement en Aluminium v. Hunter Engineering Co., Inc.*, 655 F.2d 938, 941 (9th Cir. 1981); *Miller v. United States*, 587 F.2d 991, 994

(9th Cir. 1978). Therefore, as with any question of law not involving a factual determination, it is illogical to speak of burdens of proof.

## II.

### PLAINTIFFS HAVE ABANDONED THEIR ANTITRUST CLAIMS.

The first claim for relief alleged in the complaint in this action seeks damages and injunctive relief for alleged violations of the Sherman Antitrust Act (15 U.S.C. §§1, 2). (EX 1-5.) The district court held that there was no unreasonable restraint of trade by reason of Kodak's actions and that, in fact, the application of Kodak's policy promotes competition in the photofinishing market because plaintiffs and others similarly situated must take their film to plaintiffs' competitors for development. (EX 378-79.) The district court also held that the Sherman Act does not compel Kodak to deal with all who seek its services, citing *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919), as holding that a private corporation "is free to exercise an independent discretion as to the parties with whom he will deal, announcing in advance the circumstances under which he will refuse to sell." (EX 379: 11-15.)

Based on these rulings, the district court dismissed plaintiffs' first claim for relief with leave to amend within ten days. (EX 408: 3-9.) Plaintiffs failed to amend their complaint within the time allowed and final judgment was entered in favor of Kodak on that claim. (EX 412-14.)

Rather than pursuing their antitrust claims in their opening brief, plaintiffs have chosen to ignore the antitrust issues. Therefore, plaintiffs must be held to have abandoned their antitrust claims for purposes of this appeal. *Ellingson v. Burlington Northern, Inc.*, 653 F.2d 1327, 1331-32 (9th Cir. 1981); *Levy v. Urbach*, 651 F.2d 1278, 1280-81 fn. 3 (9th Cir. 1981); *Pan-Islamic Trade Corp. v. Exxon Corp.*,

632 F.2d 539, 542 fn. 2 (5th Cir. 1980), *cert. denied*, \_\_\_ U.S. \_\_\_, 102 S.Ct. 427 (1981); *Harris v. Plastics Manufacturing Co.*, 617 F.2d 438, 440 (5th Cir. 1980).

Moreover, the district court's ruling was correct. The *Colgate* doctrine has been simply stated as follows: A unilateral refusal to deal, without more, it is not unlawful under the Sherman Act in the absence of a purpose to create or maintain a monopoly. This doctrine has been expressly adopted by this Court. *Marquis v. Chrysler Corp.*, 577 F.2d 624, 640 (9th Cir. 1977); *Moore v. Jas. H. Matthews & Co.*, 550 F.2d 1207, 1220 (9th Cir. 1971). Only a refusal to deal which is anticompetitive in purpose or effect, or both, constitutes an unreasonable restraint of trade in violation of the Sherman Act. *Fount-Whip, Inc. v. Reddi-Whip, Inc.*, 568 F.2d 1296, 1300 (9th Cir. 1978); *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970) (liquor distiller's termination of wholesale liquor distributor for legitimate business purposes and not for some anticompetitive or monopolistic objective is not actionable under the Sherman Act); *Official Airline Guides, Inc. v. Federal Trade Commission*, 630 F.2d 920 (2d Cir. 1980), *cert. denied*, 450 U.S. 917 (1981) (monopolist publisher of airline flight schedules not seeking to preserve its own monopoly and not acting to benefit itself competitively did not have a duty not to discriminate between certified air carriers and commuter airlines in a fashion which placed the latter at a significant competitive disadvantage).

### III.

#### PLAINTIFFS ARE BOUND BY THE TERMS AND LIMITATIONS STATED IN KODAK'S NOTICE TO CUSTOMERS.

The provisions of Kodak's customer notice, which was given to plaintiffs' representative DeMarco, state in part the terms upon which Kodak is willing to accept film for pro-

cessing and return to customers. Such terms constitute a part of the contract which defines the legal relationship between Kodak and its customers and the rights and duties of Kodak. Pursuant to such contract, Kodak has the right not to return to customers, including plaintiffs, pictures which depict the kind of sexually explicit conduct described in Kodak's customer notice. Plaintiffs, by submitting film to Kodak with knowledge of the terms and limitations of Kodak's offer to process and return pictures to customers, accepted and became bound by those terms and limitations.<sup>6</sup>

When an offer to render a service on conditions is made, an acceptance of the service constitutes an acceptance of the conditions or limitations of the offer as well. *Massachusetts Mutual Life Insurance Co. v. George & Co.*, 148 F.2d 42, 46 (8th Cir. 1945). Similarly, the receipt and acceptance by one party to a contract of a writing from the other party purporting to state the terms and conditions of the contract binds both parties. *Bernard v. Walkup*, 272 Cal.App.2d 595, 602, 77 Cal.Rptr. 544 (1969).

Plaintiffs contend that they did not agree to the terms of Kodak's notice or waive any right or claim against Kodak for the return of their pictures. (EX 299: 6-10.) However, plaintiffs expressed no reservations or objections to Kodak's policy when their pictures were submitted to Kodak for processing. Accordingly, they are bound by the terms of Kodak's notice. It is axiomatic that the existence of mutual assent to a contract is determined by objective rather than subjective criteria, considering the outward manifestations

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<sup>6</sup>The district court did not rely upon this contract ground for its decision. However, faced with an almost identical lawsuit brought by another magazine publisher, the New Jersey state courts recently granted judgment in favor of Kodak on this basis. *Penthouse International, Ltd. v. Eastman Kodak Co.*, 179 N.J. Super. 155 (Ch. Div. 1980), *affid. per curiam*, No. A-3110-80-T2 (App. Div. April 2, 1982).

of the acts said to constitute the acceptance. *Meyer v. Benko*, 55 Cal.App.3d 937, 942-43, 127 Cal.Rptr. 846 (1976). Plaintiffs' unconditional submission of film to Kodak for processing constituted plaintiffs' acceptance of the conditions and limitations of Kodak's offer and the formation of a contract on those terms.

IV.

THE DISTRICT COURT CORRECTLY HELD THAT PLAINTIFFS HAVE NO CLAIMS FOR RELIEF AGAINST DEFENDANT UNDER 42 U.S.C. §1983 OR THE FIRST OR FOURTEENTH AMENDMENTS BECAUSE PLAINTIFFS HAVE FAILED TO ESTABLISH THAT KODAK'S ACTIVITIES CONSTITUTE STATE OR GOVERNMENTAL ACTION.

The district court concluded that plaintiffs' second claim for relief, based on Kodak's alleged violation of 42 U.S.C. §1983, lacks the "under color of state law" element required to establish a right to recover under that statute and granted defendant's motion for summary judgment thereon. The district court ruled similarly on plaintiffs' third claim for relief, holding that Kodak's policies and practices lack the state or governmental involvement necessary to establish a violation of plaintiffs' rights protected by the First and Fourteenth Amendments to the United States Constitution and thus cognizable by the district court. (EX 389-91.) In reaching these conclusions, the district court rejected plaintiffs' contention that the requisite state or governmental involvement in Kodak's challenged policy is satisfied by (1) the fact that state and federal trademarks and federal patents have allegedly been granted to Kodak (EX 389: 17-20) and (2) the fact that Kodak's sexually explicit picture policy was adopted in order to avoid the risk of prosecution under constitutionally valid state and federal obscenity laws. (EX 389-91.)

A-117

Plaintiffs challenge these conclusions, chiefly by criticizing the authorities relied upon by the district court and taking these authorities out of context. These attacks are without merit. They are also inconsequential for, as we will show, both of the district court's conclusions were correct, and therefore the resulting judgment must be affirmed.<sup>7</sup>

**A. The Requirements for Showing State or Governmental Action Within the Meaning of 42 U.S.C. §1983 and the First and Fourteenth Amendments.**

Plaintiffs' second, third and fourth claims for relief are alleged in the complaint to "arise under" federal law — the second claim under 42 U.S.C. §1983 and the third and fourth claims under the First and Fourteenth Amendments to the United States Constitution. However, as the district court correctly concluded, plaintiffs failed to show that these allegations are well founded.

It is established that the "state action" requirement of the Fourteenth Amendment is equivalent to the "under color of state law" requirement of 42 U.S.C. §1983. *United States v. Price*, 383 U.S. 787, 794 fn. 7 (1966); *Briley v. State of California*, 564 F.2d 849, 855 (9th Cir. 1977). It is also established that the prohibitions of the Fourteenth Amendment do not apply to conduct which falls wholly within the

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<sup>7</sup>Plaintiffs' focusing of their argument upon the district court's opinion "misconstrues the function of this appellate tribunal. It is [this court's] task to review final judgments, not to pass upon the cogency or lack thereof of any particular rationale upon which the district court may rely." *City of Milwaukee v. Saxbe*, 546 F.2d 693, 704 (7th Cir. 1976). As this Court has previously observed, if "the ultimate conclusion of the district court . . . is correct, we need not determine whether the lower court relied upon a wrong ground or gave a wrong reason." *Moore v. James H. Matthews & Co.*, 550 F.2d 1207, 1219 (9th Cir. 1977). The governing rule is that a district court's decision that is legally correct must be affirmed regardless of the reasons given therefor by the lower court. *Helvering v. Gowran*, 302 U.S. 238, 245 (1937); *Hummell v. S.E. Rykoff & Co.*, 634 F.2d 446, 452 (9th Cir. 1980).

private sector. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 721-22 (1961). Similarly, the constitutional guarantees of freedom of speech and press offer protection against state or federal governmental action only; they neither apply to nor restrict private action. *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 114 (1973). Consequently, where action taken is by a private corporation with no overriding or pervasive governmental involvement, the provisions of the First and Fourteenth Amendments impose no limitations upon that action. *Ginn v. Mathews*, 533 F.2d 477, 479 (9th Cir. 1976); *Holodnak v. Avco Corp., Avco-Lycoming Division*, 514 F.2d 285, 292 (2d Cir.), *cert. denied*, 423 U.S. 892 (1975).

It is true the situations do arise where state or federal law, custom or policy and the conduct of private corporations or individuals are so intertwined that the activities of the latter are held to constitute "state action" or "governmental action", bringing their conduct within the reach of statutory or constitutional provisions not applicable to private action. The Supreme Court announced the following test for determining whether or not sufficient governmental involvement to constitute "state action" exists in the actions of a private regulated business:

. . . the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself. *Jackson v. Metropolitan Edison Company*, 419 U.S. 345, 351 (1974) (citations omitted).

This Court likewise has held that where the challenged action is that of a private individual, the central inquiry is whether the government is significantly involved or entangled in the private action. *Melara v. Kennedy*, 541 F.2d 802, 804 (9th Cir. 1976).

Plaintiffs argue that there is a sufficient connection between Kodak, the United States and California to make Kodak's conduct "state action" or "governmental action" both generally and in the context of this case, based on plaintiffs' allegations:

- (1) "that the unique superiority of Defendant's product is the result of Defendant's ownership of numerous patents granted by the United States and trademarks registered by the United States in various States." (EX 6: 3-6.); and
- (2) that certain federal and state obscenity statutes have "delegated to Kodak the responsibility of censoring the speech of Plaintiffs and all other customers . . . who wish to use Defendant's unique processing ability." (EX 6: 20-24; 8: 8-12.)

The district court correctly rejected these contentions.

**B. The District Court Correctly Held That the Grant of Exclusive Patent and Trademark Rights Does Not Make the Conduct of the Grantee State or Governmental Action.**

Plaintiffs appear to contend that because Kodak allegedly holds federal patents and federal and state trademarks, *all* of Kodak's conduct constitutes state or governmental action. If plaintiffs were correct, then *every act* of any holder of a patent or trademark would constitute state or governmental action. The district court correctly rejected this bizarre contention in the light of precedents in analogous situations. (EX 389: 17-20.)

It is clear that the grant of a corporate charter does not involve the state to such a degree in the activities of the chartered corporation as to make the latter's business policies and practices "state action". *Greenya v. George Washington University*, 512 F.2d 556, 560 (D.C. Cir.),

*cert. denied*, 423 U.S. 995 (1976). Similarly, the grant of a liquor license to a private club does not sufficiently implicate the state in the racially discriminatory policies of that club so as to satisfy the "state action" requirement of the Equal Protection Clause of the Fourteenth Amendment. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 177 (1972). Nor does the fact that private entities conduct business pursuant to state licenses and permits make their activities state action. *Fulton v. Hecht*, 545 F.2d 540 (5th Cir.), *cert. denied*, 430 U.S. 984 (1977) (state licensing and regulation of greyhound race track did not make licensee's acts state action within §1983); *Gemini Enterprises, Inc. v. WFMY Television Corp.*, 470 F.Supp. 559 (N.D.N.C. 1979) (action by state-licensed broadcaster denying astrological forecasting service media access did not constitute state action within §1983); *Guthrie v. Alabama By-Products Co.*, 328 F.Supp. 1140 (N.D.Ala. 1971), *aff'd*, 456 F.2d 1294 (5th Cir. 1972), *cert. denied*, 410 U.S. 946 (1973) (discharge of industrial waste pursuant to state-issued permit did not constitute state action within §1983); *cf. Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973) (plurality opinion: action of broadcast licensee in not accepting editorial advertisements did not constitute governmental action under the First Amendment).

Plaintiffs contend that the "unique superiority" of Kodak's product is the result of its ownership of numerous patents and trademarks. (AOB 20.) However, this conclusory allegation, if true, would contribute nothing towards satisfying the governmental action requirement. The Supreme Court has held that the claim that a state allegedly conferred monopoly status upon a defendant is not determinative in considering whether or not that defendant's termination of electrical service to the petitioner was "state action" within the Fourteenth Amendment. *Jackson v.*

*Metropolitan Edison Company*, 419 U.S. 345, 351-52 (1974); *accord*, *Taylor v. St. Vincent's Hospital*, 523 F.2d 75, 77-78 (9th Cir. 1975), *cert. denied*, 424 U.S. 948 (1976).

Plaintiffs have cited no case and we have found none deciding the precise question whether a grant of patent or trademark rights is sufficient to make all of the activities of the grantee "state action". The above-cited analogous cases dealing with actions under state charters, permits and licenses require a negative conclusion. Moreover, whereas those cases dealt with a state's authorization of private entities to engage in particular activities affecting third parties, the alleged grant of exclusive patent and trademark rights to Kodak is not necessary to authorize and does not authorize the transaction of business by Kodak. Instead, it merely prevents third parties from interfering with protected property rights of Kodak.<sup>8</sup> Therefore, there is really less governmental involvement in Kodak's exercise of its protected property rights than there is in the above-cited cases.

**C. The District Court Correctly Concluded That Kodak Does Not Act "Under Compulsion of Law" Within the Meaning of Prior Racial Discrimination Cases.**

Plaintiffs argue that Kodak's taking of steps designed to avoid possible prosecution under constitutionally valid federal and state obscenity laws makes Kodak's policy and

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<sup>8</sup>Plaintiffs cite *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964) and *Griffith Rubber Mills v. Hoffer*, 313 F.2d 1 (9th Cir. 1963), for the proposition that patent and trademark rights are issued not for private benefit but for the public good. (AOB 22-23.) However, neither of these cases advance plaintiffs' argument. Both note that the grant of a patent is the grant of a statutory monopoly which gives the patent holder the right to exclude others from the unauthorized use of his invention for a limited period of years. Patent grants benefit the general public in the sense that the patent holder must publicly disclose his invention to get his patent and that, upon expiration of the patent, the invention enters the public domain and may be used freely by anyone.

practice state or governmental action. This contention is specious.

The evidence is uncontroverted that Kodak acted *unilaterally* in adopting its challenged policy and *not* in concert or collaboration with, or at the request or instigation of, any federal or state law enforcement official. Nor did Kodak act to further the social policies reflected in the obscenity laws, or as a "volunteer policeman" to see that those laws are enforced against plaintiffs or anyone else. Kodak adopted its policy only to protect its own interest, solely because Kodak fears that returning the sexually explicit pictures it withholds might subject Kodak and/or its employees to the risk of being criminally prosecuted for violating constitutionally valid state and federal obscenity laws. In adopting the challenged policy Kodak's officers acted solely as business executives, *not* as either adjunct government officials, censors, or moral crusaders. (EX 100-05.)

Nevertheless, plaintiffs contend that the requisite state or governmental action element is satisfied because Kodak allegedly acted "under compulsion" of federal and state obscenity statutes. (AOB 10-20.) Plaintiffs base their argument on three Supreme Court decisions applying a less restrictive jurisdictional requirement respecting state or governmental action in cases involving charges of racial discrimination. See *Adickes v. S.H. Kress and Company*, 398 U.S. 144 (1970); *Robinson v. State of Florida*, 378 U.S. 153 (1964); and *Peterson v. City of Greenville, South Carolina*, 373 U.S. 245 (1963); (AOB 10-13).

The district court found that Kodak is not involved in any racial discrimination and that the less exacting state action requirement applied by the Supreme Court in certain racial discrimination cases therefore does not apply here. (EX 390-91.) The district court also held that the less exacting governmental action requirement of the racial discrimination

cases does not apply to the plaintiffs' claimed deprivation of their First Amendment Rights. (EX 390: 10-17.) These conclusions are correct and mandate affirmance of the district court's judgment in this action.

The record clearly shows that Kodak did not adopt and is not implementing its challenged policy by reason of any federal or state statutory or other governmental directive that Kodak do so. Rather, Kodak has unilaterally chosen to act as it does in order to avoid the risk of prosecution under federal and state obscenity laws. As stated by this Court in *Adams v. Southern California First National Bank*, 492 F.2d 324, 331 (9th Cir. 1973), "... subjecting all behavior that conforms to state law to the Fourteenth Amendment would emasculate the state action concept."

Furthermore, many decisions have held that the less exacting state or governmental action requirement applied by the Supreme Court in the decisions cited by plaintiffs does not apply outside the context of racial discrimination. *Schlein v. Milford Hospital, Inc.*, 561 F.2d 427, 428 fn. 5 (2d Cir. 1977); *Granfield v. Catholic University of America*, 530 F.2d 1035, 1046 fn. 29 (D.C. Cir.), cert. denied, 429 U.S. 821 (1976); *Fletcher v. Rhode Island Hospital Trust and National Bank*, 496 F.2d 927, 931 (1st Cir.), cert. denied, 419 U.S. 1001 (1974); *Jackson v. Staller Foundation*, 496 F.2d 623, 628-29 (2d Cir. 1974), cert. denied, 420 U.S. 927 (1975); *Adams v. Southern California First National Bank*, supra, 492 F.2d 324, 333 (9th Cir. 1973), cert. denied, 419 U.S. 1006 (1974); see also *Scott v. Eversole Mortuary*, 522 F.2d 1110, 1119 (9th Cir. 1975) (Judge Ely concurring in part, dissenting in part). The stated rationale for the Supreme Court's willingness to more readily find state or governmental action in the area of racial discrimination is that government inaction or neutrality in the face of such discrimination has often been found to

constitute affirmative encouragement. *Schlein v. Milford Hospital, Inc.*, *supra*, 561 F.2d 427, 428 fn. 5 (2d Cir. 1977).<sup>9</sup>

The Supreme Court cases relied upon by plaintiffs are also distinguishable from the case at bench for another reason: all of them involved refusal of service to customers by places of public accommodation — lunch counters and the like — *i.e.*, establishments having a historical common law duty to serve all in the community. As the district court found, applying *Colgate*, Kodak is under no such duty but is free to deal with whom it chooses. A criminal statute which induces or encourages a place of public accommodation to practice racial discrimination is one thing for purposes of applying the state or governmental action doctrine; a criminal statute which causes a private corporation to eschew trafficking in *Miller*-type obscenity simply to avoid violating the law is another.

Furthermore, in each of the Supreme Court decisions relied upon by plaintiffs, the private party's segregation

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<sup>9</sup>Justice Brennan, concurring in part and dissenting in part in *Adickes v. S.H. Kress and Company*, 398 U.S. 144 (1970), stated as follows:

The state-action doctrine reflects the profound judgment that denials of equal treatment, and particularly denials on account of race or color, are singularly grave when government has or shares responsibility for them. Government is the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct. *Therefore something is uniquely amiss in a society where the government, the authoritative oracle of community values, involves itself in racial discrimination. Accordingly, in the cases that have come before us this Court has condemned significant state involvement in racial discrimination, however subtle and indirect it may have been in whatever form it may have taken.* These decisions represent vigilant fidelity to the constitutional principle that no State shall in any significant way lend its authority to the sordid business of racial discrimination. *Id.*, 398 U.S. at 190-91 (emphasis added; citations omitted).

policy was enforced by use of the state's criminal trespass or vagrancy laws. The private party discriminator was put on notice that should he choose to discriminate he could call upon the state police power to effectuate his private decision through the imposition of criminal sanctions. Thus, the purposes of the respective state schemes were clearly to foster and encourage racial discrimination and to afford private discriminators a remedy under state criminal law to enforce their decision to discriminate. No such circumstances are present in the instant action regarding Kodak's uniform policy not to return certain sexually explicit pictures to any customers.

Only one decision has applied the "compulsion doctrine" of the racial discrimination cases outside of that context. That case is *Doe v. Charleston Area Medical Center, Inc.*, 529 F.2d 638 (4th Cir. 1975), holding that a private hospital acted under color of state law when it refused to allow its facilities to be used by the plaintiff for an abortion, because the hospital feared criminal prosecution if abortions were permitted. The district court correctly concluded that the *Doe* decision of the Fourth Circuit stands alone. (EX 401: 1-5.)

Defendant submits that *Doe* is simply wrong and should not be followed in this case. A decision by the Court of Appeals of another Circuit is not binding on this Court. *Allstate Insurance Co. v. Stevens*, 445 F.2d 845, 846 (9th Cir. 1971); 1B *Moore's Federal Practice*, ¶0.402[1], p. 63 (1982). Furthermore, one ground for the decision in *Doe* was that the state action element is satisfied in the case of a private hospital by the receipt of federal funds under the Hill-Burton Act (42 U.S.C. §§291 *et seq.*). This view has been rejected by nearly every Circuit, including the Fourth Circuit. *Modaber v. Culpeper Memorial Hospital, Inc.*, No. 81-1550 (4th Cir. Mar. 24, 1982); *Ward v. St. Anthony*

*Hospital*, 476 F.2d 671, 674-75 (10th Cir. 1973); *Taylor v. St. Vincent's Hospital*, 523 F.2d 75, 77 (9th Cir. 1975), *cert. denied*, 424 U.S. 948 (1976); *Briscoe v. Bock*, 540 F.2d 392, 395-96 (8th Cir. 1976); *Musso v. Suriano*, 586 F.2d 59, 62-63 (7th Cir. 1978), *cert. denied*, 440 U.S. 971 (1979); *Jackson v. Norton-Children's Hospitals, Inc.*, 487 F.2d 502, 503 (6th Cir. 1973), *cert. denied*, 416 U.S. 1000 (1974); *Madry v. Sorel*, 558 F.2d 303, 304-05 (5th Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978); *Hodge v. Paoli Memorial Hospital*, 576 F.2d 563, 564 (3d Cir. 1978); *Schlein v. Milford Hospital, Inc.*, 561 F.2d 427, 428 (2d Cir. 1977). Moreover, the alternative basis for the decision in *Doe*, that the hospital's anti-abortion policy based on West Virginia's criminal abortion statute constituted state action, has never been cited with approval by any subsequent decision. As in the Supreme Court racial discrimination cases, the West Virginia criminal abortion statute upon which the hospital's policy was based in *Doe* was held unconstitutional on its face. Therefore, the *Doe* decision must be viewed as an aberration, standing alone, which is neither binding on this Court nor applicable to the instant facts.

**D. Kodak's Policy Does Not Constitute Censorship of Plaintiff's Activities or Publications.**

Plaintiffs argue that the federal government and California have by their obscenity statutes "delegated" to Kodak the "traditional power and public function of a censor" and that Kodak's conduct pursuant to such delegation constitutes the requisite state or governmental action. (AOB 23-27.) This argument finds no support whatever in the record. In giving effect to its policy and practice of refusing to return certain sexually explicit pictures, Kodak sits as neither court, trier of fact, nor censor and Kodak neither exercises

nor purports to exercise governmental powers. Kodak has no interest in suppressing what plaintiffs publish; the independent business judgment reflected in Kodak's policy is simply one of trying to avoid the risk of prosecution under the obscenity laws. Moreover, plaintiffs are not in fact "censored", *i.e.*, precluded from publishing their magazines, as shown by their admission, if not boast, that they are currently publishing what is, by their self-asserted most demanding critical and artistic standards, a "present superior product." (EX 274: 4.)

Plaintiffs rely on *Marsh v. State of Alabama*, 326 U.S. 501 (1946), wherein the Supreme Court held that the Fourteenth Amendment applied to nominally private activities abridging free speech where the government had delegated to a private group the power to perform traditionally public functions. In *Marsh*, the Court held that the state could not impose criminal punishment on a member of the Jehovah's Witnesses who undertook to distribute religious literature on the premises of a company-owned town contrary to the wishes of the town's management. Of course the situation of the company town in *Marsh* is totally different and distinguishable from that of Kodak in the instant case. Unlike the company town in *Marsh*, Kodak does not possess the indicia of a government sanctioned censor nor does its challenged practice result in the actual censorship of plaintiffs' magazines. Kodak's challenged practice, unlike the enforcement of the town ordinance in *Marsh*, does *not* bar plaintiffs from publishing and distributing their magazines when and where they choose and with whatever content they choose. At most, Kodak's policy precludes Kodak's knowing participation in anyone's possibly pornographic activities.

Furthermore, in *Melara v. Kennedy*, 541 F.2d 802, 805 (9th Cir. 1976), this Court, while noting decisions of other courts holding that state action may be found where there

has been a delegation of traditional state functions to private parties through the enactment of state statutes, noted that the "delegation of state function" rationale had never been accepted by the Ninth Circuit. In *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 163 (1978), the Supreme Court cited *Marsh* and its progeny re the potential expansion of the public function doctrine and concluded as follows:

Thus, even if we were inclined to extend the sovereign function doctrine outside of its presently carefully confined bounds, *the field of private commercial transactions would be a particularly inappropriate area into which to expand it.* (Emphasis added.)

Therefore, even assuming for purposes of argument the specious premise that Kodak's actions constitute performance of a traditional public function of sovereignty, this would not satisfy the requisite "governmental action" element because Kodak's actions are confined to the field of private commercial transactions.

To hold that Kodak's policy constitutes "state action" or "governmental action" would place Kodak in a "Catch-22" dilemma: If Kodak disobeys the constitutionally valid federal and state obscenity statutes by returning certain sexually explicit pictures to customers, Kodak risks having to defend itself and its employees against federal and/or state criminal prosecutions;<sup>10</sup> if Kodak attempts to avoid violating these statutes, it then risks the filing of this action and others of like character. In either event, Kodak must incur heavy legal expense, disruption of normal business activity, and the risk of a costly and/or punitive outcome through criminal

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<sup>10</sup>A film processing laboratory employee was so convicted in *Gold v. United States*, 378 F.2d 588 (9th Cir. 1967); cf. *Spillman v. United States*, 413 F.2d 527 (9th Cir.), cert. denied, 396 U.S. 930 (1969) (conviction under 18 U.S.C. §1461 for mailing undeveloped movie film for processing).

prosecutions and/or civil actions brought against the Company and/or its employees. The district court recognized that to place Kodak in such a situation — *i.e.*, “in the middle” between plaintiffs and law enforcement authorities, the true antagonists in the pornography field — would be nothing short of monstrous.

V.

**PLAINTIFFS’ CLAIM FOR DECLARATORY RELIEF LACKS THE CONCRETE ADVERSENESS NECESSARY TO CREATE A JUSTICIABLE CONTROVERSY.**

Plaintiffs’ fourth claim for relief seeks a declaratory judgment against Kodak that certain federal and state obscenity statutes are unconstitutional to the extent that they may be interpreted as prohibiting a film processing company from returning sexually explicit pictures in those instances where development of the pictures “is merely an interim step in the publishing process of a magazine.”<sup>11</sup> (EX 10: 1-6.) Plaintiffs seek a declaration that the federal and state obscenity statutes are unconstitutional both facially and as applied to Kodak because, it is said, they operate as a prior restraint creating an impermissible chilling effect upon plaintiffs’ speech. (EX 10: 1-11.)

Kodak has no interest in defending against this claim or upholding the challenged enactments. Based on this fact, the district court correctly held that it did not have federal subject matter jurisdiction to determine the constitutionality

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<sup>11</sup>Plaintiffs claim that, because they are magazine publishers, the First Amendment gives them a right of special access to Kodak’s facilities to develop their sexually explicit pictures, beyond the constitutional right accorded to members of the general public. This is simply untrue. The Constitution does not require that the press be given special access to information sources not shared by members of the public generally. *Pell v. Procunier*, 417 U.S. 817, 834 (1974) (upholding the constitutionality of a California prison regulation barring members of the news media from conducting face-to-face interviews with preselected inmates).

of the challenged state and federal obscenity statutes because this case lacks the concrete adverseness necessary to create a justiciable controversy within the meaning of article III, section 2, clause 1 of the United States Constitution and the Federal Declaratory Judgment Act (28 U.S.C. §2201). (EX 392-94.)

Article III, section 2, clause 1 of the United States Constitution and the Federal Declaratory Judgment Act (28 U.S.C. §2201) extend the federal judicial power only to cases of "actual controversy" wherein declaratory relief is sought. A federal court has no power to issue a declaratory judgment regarding the constitutionality of a statute unless there is an actual and substantial controversy as to the constitutionality of the statute between parties having truly adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. *Golden v. Zwickler*, 394 U.S. 103, 108 (1969). In this case, Kodak has no such legal interest or motive to defend the constitutionality of the federal and state obscenity statutes attacked by plaintiffs.

The standard for finding a justiciable controversy is no less demanding in a declaratory judgment action than in any other type of federal court action. *Societe de Conditionnement v. Hunter Engineering*, 655 F.2d 938, 942 (9th Cir. 1981); *Western Mining Council v. Watt*, 643 F.2d 618, 623-24 (9th Cir.), *cert. denied*, \_\_\_ U.S. \_\_\_, 102 S.Ct. 567 (1981).

In the instant case, no representatives of the California and federal governments are before the district court to assert the constitutional validity of the challenged California and federal obscenity statutes. Kodak does not have a personal stake in the outcome of plaintiffs' declaratory relief claim nor any intention of placing itself in the role of the federal government or the State of California to resist it. Under

these circumstances the situation before the district court did not "assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for elimination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962); see also *League of Women Voters of California v. Federal Communications Commission*, 489 F.Supp. 517, 520 (C.D.Cal. 1980) (no sufficient genuine adversity where defendant FCC did not attempt to posit any arguments in support of the challenged statute forbidding non-commercial broadcast licensees to editorialize or oppose political candidates).

Plaintiffs point to the existence of 28 U.S.C. §2403, permitting state or federal intervention relating to the constitutionality of challenged statutes affecting the public interest, as protection against this becoming a "collusive" action. (AOB 28-29.) However, as the district court correctly concluded (EX 393-94), the existence of §2403 cannot by itself generate an actual case or controversy where none existed between the private litigants. *United States v. Johnson*, 319 U.S. 302 (1943); *Ruotolo v. Ruotolo*, 572 F.2d 336 (1st Cir. 1978).

#### VI.

THE DISTRICT COURT CORRECTLY HELD THAT PLAINTIFFS FAILED TO COMPLY WITH FEDERAL RULE OF CIVIL PROCEDURE 56(f) AND CANNOT NOW COMPLAIN THAT THE SUMMARY JUDGMENT MOTION WAS PREMATURE.

Plaintiffs contend that the district court should not have ruled on Kodak's motion for summary judgment until the plaintiffs had been afforded an adequate opportunity to conduct discovery. (AOB 45.) The district court rejected this contention because plaintiffs failed to file affidavits requesting a continuance of the summary judgment motion pursuant to Federal Rule of Civil Procedure 56(f). (EX 378: 4-7; 385-88.) It is well established that the plaintiffs' failure

to take advantage of the Rule 56(f) procedural remedy prevents them from now complaining regarding the timing of summary judgment in this case. *THI-Hawaii, Inc. v. First Commerce Financial Corporation*, 627 F.2d 991, 994 (9th Cir. 1980); *British Airways Board v. The Boeing Company*, 585 F.2d 946, 954 (9th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979). Therefore, plaintiffs cannot now contend that the district court acted prematurely in granting Kodak's motion for summary judgment.

CONCLUSION.

For the reasons and based on the authorities discussed above, the judgment of the district court should be affirmed.

Respectfully submitted,

JOHN R. McDONOUGH,  
J. STEVEN GREENFELD,  
BALL, HUNT, HART, BROWN  
AND BAERWITZ,  
*Attorneys for Appellee.*

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